IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. _____

DELTA DEVELOPMENT COMPANY, INC., ET AL.,

Petitioners

versus

UNITED STATES OF AMERICA, GETTY OIL COMPANY, GULF OIL CORPORATION, THOMAS CONNELL and THE LOUISIANA LAND AND EXPLORATION COMPANY,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Delta Development Company, Inc., and John E. Pottharst, Jr., Mildred Pottharst Ellis, Viola Pottharst Rowland (in various capacities), appellants below, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on September 16, 1971, in the above case, which affirmed the judgment of the District Court, dated and entered April 8, 1971 (App., *infra*, p. 130).

A. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (App., *infra*, p. 102) is reported at 447 F. 2d 989, and, the opinion of the United States District Court for the Eastern District of Louisiana, New Orleans Division (App., *infra*, p. 106), is reported at 322 F. Supp. 121.

B. JURISDICTION

The judgment of the Court of Appeals was dated and entered September 16, 1971 (App., *infra*, p. 103), and upon a timely petition for rehearing being filed by petitioners same was denied by order dated and entered October 8, 1971 (App., *infra*, p. 105). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1), which provides that cases in the Courts of Appeals may be reviewed by this Court, "by writ of certiorari granted upon the petition of any party to any civil . . . case, . . . after rendition of judgment or decree."

C. QUESTIONS PRESENTED FOR REVIEW

1. Where the President in 1886 placed the lands here involved under the control of the Secretary of the Interior for disposition as provided in the Act of July 5, 1884 (App., *infra*, p. 136), whether such lands *immediately* became "public lands," and as such, thereafter (a) became subject to disposition under the Act of July 17, 1914 (App., *infra*, p. 141), and (b) became subject to the provisions of Executive Order No. 6964 of February 5, 1935 (App., *infra*, p. 158), and in turn subject to Section 7 of the Taylor Grazing Act as amended by the Act of June 26, 1936 (App., *infra*, p. 141).

2. Whether the unsigned, undated and unauthorized marginal notation appearing upon the final certificate issued to John E. Pottharst, was hearsay evidence, rather than an "official statement" or "official entry," and thus inadmissible in evidence over timely objection made, and could not serve to negate or contradict the terms and provisions of the final certificate, particularly since there was no "duty" to make the notation.

3. Where the final certificate issued to John E. Pottharst by the Director of the Bureau of Land Management (BLM) acknowledged that Pottharst had purchased and paid for the land (including the disputed minerals) and was entitled to a patent therefor, and, in executing the final certificate the Director *did not* affix thereto the marginal notation *mandatorily required* by the regulations[1] if the certificate had been issued under the Act of July 17, 1914, whether the certificate evidenced the vesting of the equitable title to the land and minerals in Pottharst and would therefore control the subsequent patent which the certificate authorized.

4. Whether the Act of July 17, 1914 (App., *infra*, p. 141) had any application to these lands, and if so, was it administratively applied thereto from the standpoint of a proper interpretation of the clause: "Lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, *or which are valuable for those deposits* . . . ," and, the required administrative determination that these lands were "valuable for those deposits."

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1. The regulations referred to are those issued pursuant to the Act of July 17, 1914 (App., *infra*, p. 155), and more particularly 43 C.F.R. § 102.28, as modified by 43 C.F.R. § 4.250 (App., *infra*, p. 150).

5. Where Section 7 of the Taylor Grazing Act (App., *infra*, p. 144) authorized the Secretary of the Interior "to *examine* and *classify*" lands subject thereto as "more valuable or suitable for any other use" than elsewhere provided in the Act, "and to *open* such lands . . . *for disposal* in accordance with such classification under applicable public-land law(s)," whether the Secretary could be held to have:

(a) classified these lands under the Act of July 17, 1914, without *expressly* determining that same could be disposed of under the said 1914 Act and *expressly* finding them to be "valuable" for specified mineral deposits, and

(b) opened these lands for disposal under said 1914 Act, without expressly so stating, including the specifying of the Act by name.

6. Where the final certificate vested John E. Pottharst with the equitable title to the land (including the disputed minerals) and through an unauthorized clerical error committed in the performance of the ministerial act of issuing the patent, a mineral reservation was inserted in the patent, whether the reservation was simply a nullity as unauthorized and full title vested by the patent, or, could Pottharst's equitable title to the minerals be divested in favor of the United States by the application of a so-called "doctrine of acquiescence."

Subsidiary questions comprised in the foregoing will be noted hereafter.

D. STATUTES, REGULATIONS AND EXECUTIVE ORDERS INVOLVED

Pertinent portions of these matters are reproduced in the Appendix hereto.

STATUTES:

Act of June 12, 1858 (Section 6), 11 Stat. 332, 336 (Appendix, *infra*, p. 136)

Act of July 5, 1884, 23 Stat. 103, 43 U.S.C. 1071, et seq.[1] (Appendix, *infra*, p. 136)

Act of July 17, 1914, 38 Stat. 509, 30 U.S.C. 121, et seq. (Appendix, *infra*, p. 141)

Act of March 4, 1933, 47 Stat. 1570, 30 U.S.C. 124 (Appendix, *infra*, p. 143)

Taylor Grazing Act, Act of June 28, 1934 (Section 7), 48 Stat. 1272, as amended by Section 2, Title I, of the Act of June 26, 1936, 49 Stat. 1976, 43 U.S.C. 315f (Appendix, *infra*, p. 144)

Act of March 3, 1887 (Section 5), 24 Stat. 557, 43 U.S.C. 898 (Appendix, *infra*, p. 146)

Pickett Act, Act of June 25, 1910 (Section 1), 36 Stat. 847, 43 U.S.C. 141 (Appendix, *infra*, p. 147)

DEPARTMENT OF THE INTERIOR REGULATIONS:

43 C.F.R. § 01.2 (Appendix, *infra*, p. 148)

43 C.F.R. § 01.10 (Appendix, *infra*, p. 148)

43 C.F.R. § 01.11 (Appendix, *infra*, p. 148)

43 C.F.R. § 01.12 (Appendix, *infra*, p. 149)

43 C.F.R. § 01.21(c) (Appendix, *infra*, p. 149)

43 C.F.R. § 4.0 (Appendix, *infra*, p. 149)

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1. Sections 1, 2 and 3 of this Act were repealed in 1951.

43 C.F.R. § 4.1(b) (Appendix, *infra*, p. 150)
43 C.F.R. § 4.250 (Appendix, *infra*, p. 150)
43 C.F.R. § 102.23 (Appendix, *infra*, p. 151)
43 C.F.R. § 102.24 (Appendix, *infra*, p. 152)
43 C.F.R. § 102.25 (Appendix, *infra*, p. 152)
43 C.F.R. § 102.26 (Appendix, *infra*, p. 154)
43 C.F.R. § 102.27 (Appendix, *infra*, p. 154)
43 C.F.R. § 102.28 (Appendix, *infra*, p. 155)
43 C.F.R. § 296.4 (1943 amendment) (Appendix, *infra*, p. 157)
43 C.F.R. 296.7 (Appendix, *infra*, p. 155)
43 C.F.R. § 296.13 (Appendix, *infra*, p. 156)

EXECUTIVE ORDERS:

Executive Order No. 6964 dated February 5, 1935, 43 C.F.R. 297.12 (Appendix, *infra*, p. 158)

E. STATEMENT OF CASE

This suit was instituted in January, 1969, by respondent, United States of America (hereafter referred to as "U.S."), seeking to quiet title to certain mineral rights in and to a tract of land situated in Plaquemines Parish, Louisiana. Jurisdiction in the District Court was predicated upon 28 U.S.C. 1345 as a suit "commenced by the United States," and the cause of action asserted was based primarily upon a reservation contained in a patent for the land, dated April 22, 1947, and issued by the U. S. to John E. Pottharst. The reservation reads as follows:

"Excepting and reserving, however, to the United States all the oil, gas, sulphur, potash and sodium, in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove such deposits from the same, upon compliance with the conditions and subject to the provisions and limitations of the Act of July 17, 1914 (38 Stat. 509), as amended by the Act of March 4, 1933 (47 Stat. 1570) . . ."[1]

In addition, the U. S. made allegations relative to the following:

(1) That the reservation in the patent had "previously been expressly consented to in writing by the patentee, John E. Pottharst," obviously referring to that as described in the opinion below [2] (App., *infra*, p. 113) as:

> "On March 10, 1947, John E. Pottharst executed a document entitled 'Mineral Waiver (Oil, Gas, Etc.) Consent to the placing of application under the Act of July 17, 1914 (38 Stat. 509).' In this instrument, Pottharst consented to the amendment of his application for the purchase so as to reserve to the United States all

1. The complaint included a claim to the fissionable source materials, based upon a reservation in the patent pursuant to the Atomic Energy Act, the Act of August 1, 1946 (60 Stat. 755). On motion for new trial, the Trial Court sustained Delta, et al's motion to dismiss as to the reservation pursuant to the 1946 Act, and the judgment dismissed the claim of the U. S., et al to the fissionable source materials in and to the property. No appeal was taken from that part of the judgment. Hereafter all references to "reservation" or "minerals" contemplate the above quoted reservation pursuant to the Act of July 17, 1914, as amended (hereafter called the "1914 Act"), and the minerals named in said reservation.

2. The opinion of the Court of Appeals (App., *infra*, p. 102) adopted the opinion of the District Court (App., *infra*, p. 106), saying: "We are in agreement with the cogent opinion of the district court, . . ." Accordingly, reference hereafter to the "opinion below" is to that of the District Court as adopted by the Court of Appeals.

> the phosphate, nitrate, potash, oil, gas or asphaltic mineral deposits in the land embraced in said application, pursuant to the provisions, conditions, reservations, and limitations of the Act of July 17, 1914 (38 Stat. 509)."

(2) The fact that the patentee, Pottharst, had recorded the patent in the Conveyance Records of Plaquemines Parish, Louisiana;

(3) The fact that Pottharst, in July, 1947, had conveyed a portion of the property to petitioner, Delta, alleging that the parties to that conveyance expressly recognized "the outstanding mineral rights of the United States" by virtue of a provision inserted in the act of conveyance, to-wit:

> "This Sale is made subject to the RESERVATION of all mineral rights reserved to the United States of America under said Patent issued to VENDOR."; and

(4) The fact that the judgment of possession in the succession of the patentee, John E. Pottharst, dated June 4, 1959, in describing the property here involved then followed the description with the statement:

> "All minerals reserved to U.S.A.
>
> "Being the same property acquired by John E. Pottharst by Patent #1122086 from the U.S.A. on April 22, 1947, and duly registered in COB 125, Folio 303, on June 7, 1947."

Based upon the foregoing matters, the U. S. maintained that petitioners were precluded from asserting the nullity of the mineral reservation in the patent, because of a so-called "doctrine of acquiescence which has also been termed laches or administrative estoppel."

Under date of May 1, 1954, the U. S. had granted an oil and gas lease to respondent, Thomas Connell (Connell). Connell, along with respondents, Getty Oil Company (Getty), Gulf Oil Corporation (Gulf), and The Louisiana Land and Exploration Company (LL&E) (who hold interests through and under the federal oil and gas lease), were named in the complaint as *formal* defendants. However, since their interests are dependent upon those of the U. S., they and the U. S. will hereafter be referred to, collectively, as "U. S., et al," unless otherwise noted. Also named defendants (petitioners here) were the widow[1] and heirs (Pottharsts) of the patentee, John E. Pottharst, and his grantee (petitioner here) to a portion of the land, Delta Development Company, Inc. (Delta). These latter defendants, petitioners here, will hereafter be referred to collectively, as "Delta, et al," unless otherwise noted.

Connell made no formal appearance by pleading but he signed the Joint Stipulation of all parties, submitting the matter to the Trial Court for a decision on the merits, and LL&E filed an answer, asserting its ownership of an overriding royalty interest under the federal lease, concluding with the statement that the complaint asked for no relief as against it. Getty and Gulf filed similar answers, adopting the allegations of the complaint and pleading some six cross-claims against Delta, et al, however, due to the disposition by the opinion below, there is no need to elaborate on these cross-claims for the purposes here.

---

1. The widow of John E. Pottharst; Mildred Heintz Pottharst, died during the course of the proceedings in the Trial Court and the other Pottharst defendants were substituted as party defendants in her place and stead.

In this posture of the pleadings, the U. S., et al filed in the record (along with certain formal documents) a number of documents from the Land Office file relating to the disposition of the property to Pottharst, all as a part of a request for admission of fact and genuineness of documents directed to Delta. Delta, et al filed written objections to the request for admissions, which objections were overruled by the Court. Of these objections, only one need here be noted, and that was an objection to the admissibility of a marginal notation appearing upon the final certificate issued to Pottharst, the notation being relative to the Act of July 17, 1914, as quoted in the opinion below (App., *infra*, p. 114), the objection being that same was inadmissible because it was unsigned, undated and unauthorized and thus inadmissible hearsay. The opinion below (App., *infra*, p. 119, fn. 8) elaborated upon the overruling of petitioners' objection to the marginal notation. Whereupon petitioners filed a motion for summary judgment in their favor and against all other parties to the suit, the motion being predicated upon the final certificate issued to John E. Pottharst and to a lesser degree upon the memorandum of the Director of the BLM dated February 20, 1917, as approved by Assistant Secretary Gardner, which will be discussed hereafter. Petitioners' position as reflected by the motion was to the effect that the disposition of the property to Pottharst was administratively had under the provisions of the 1884 Act by way of an offer from Pottharst to purchase the property, coupled with his deposit of the price, and, when the Secretary, on February 28, 1917, approved the Director's memorandum of February 20, 1917, he accepted Pottharst's offer and the sale became complete, since all the requirements of the 1884 Act had been met and that statute

required no patent. Alternatively, petitioners asserted in their motion that if the Court found as a matter of law that a patent was required that nevertheless the final certificate vested Pottharst with full equitable title to the land and minerals, and, since the issuance of a patent was a mere ministerial function with the certificate serving as the authority for the officials executing the patent, the certificate would control the patent. Hence the sale evidenced by the certificate, making no provision for a reservation of minerals, the insertion of the mineral reservation in the patent was unauthorized and thus a nullity.

Thereafter the U. S., Getty and Gulf filed a motion for summary judgment, asserting pursuant thereto the mineral reservation in the patent and the "doctrine of acquiescence" above described. These cross-motions were argued and submitted to the Court and all parties then, by Joint Stipulation, agreed that the matter be submitted to the Court based upon the record as then made up as though formally tried and presented to the Court (without a jury) on the merits.

The Trial Court, in a written opinion (App., *infra*, p. 106, reported at 322 F. Supp. 121), constituting its findings of fact and conclusions of law, ruled in favor of the U. S., maintaining the validity of the mineral reservation in the patent and the "plea of acquiescence," rejecting the contentions of petitioners. On motion for new trial filed by petitioners, the judgment of the Trial Court was modified as noted in footnote 1, *supra*, p. 7, following which the final judgment (App., *infra*, p. 130) was entered, and petitioners duly appealed therefrom to the United States Court of Appeals for the Fifth Circuit.

As heretofore noted, the Court of Appeals (App., *infra*, p. 102) adopted the opinion of the District Court and (App.,

infra; p. 103) entered judgment affirming the judgment (App., *infra*, p. 130) of the District Court in favor of respondents.

Other than the matters alleged upon in the complaint in connection with the "plea of acquiescence" (*supra*, p. 7), for the purpose of the questions presented by this petition the evidence consists of the documents from the BLM file relative to the disposition of the property to John E. Pottharst, and, the deposition interrogatory testimony of Assistant Secretary of the Interior Warner W. Gardner.

The lands were reserved for military purposes in 1844, and in 1886 by presidential order they were placed under the control of the Secretary of the Interior "for disposition as provided for in said Act of July 5, 1884" (*infra*, p. 136). The lands were resurveyed, appraised and twice offered at public sale with no takers, all in accordance with the 1884 Act; and pursuant thereto they were subject to private sale by the Secretary, *in his discretion*. In July, 1946, Pottharst filed his application to purchase the lands at private sale under the 1884 Act and deposited the purchase price along with other related papers. The evidence from the Land Office file showing the processing of Pottharst's application falls into four categories.

Evidence As To The Agricultural Character Of The Land. The papers submitted by Pottharst with his application described the lands as "salt water marsh . . . (with) no agricultural value." This was concurred in by the BLM Field Examiner, for after describing the marshy character of the land, he then said: "Such is the character of the entire area embraced in this application. None of it has any value for farming, grazing or timber culture." The Chief of the Land

Classification Division of the Bureau described the land as "in general, salt marsh," and concluded "that the best service of the public interest will result from the sale . . . under the present application." Accordingly, it was undisputed that the lands were without agricultural value and clearly they were not "agricultural" lands.

EVIDENCE AS TO MINERAL CHARACTER SUBMITTED TO SECRETARY. As to the evidence submitted to the Secretary concerning the mineral character of the land, the opinion below, after noting that Pottharst had filed a nonmineral affidavit, then states that a request was then directed to the Geological Survey on July 23, 1946, concerning whether the lands "were valuable for any mineral deposits." The opinion below (App., *infra*, p. 111) then details the following:

> "(1) On July 24, 1946, the Director of the Geological Survey replied to the Commissioner of the Bureau of Land Management that available information indicated that these lands were prospectively valuable for oil and gas and that said lands were without value for other minerals.
>
> (2) On August 30, 1946, the Acting Director of the Bureau of Land Management directed a memorandum to the Supervisor of the Branch of Field Examination requesting that a report of field examination of the subject lands be made. Copies of the application, status sheets, Geological Survey report and Circular No. 1072 were enclosed with that request.
>
> (3) On October 29, 1946, Field Examiner Benjamin F. L. Heron filed a three-page typewritten report based on an on-the-ground investigation of this property made by him on October 22, 1946, which report stated that the area had a prospective value for oil and gas and that these minerals, together with sulphur, potash or other liquid or gaseous hydrocarbon minerals, in the

absence of convincing evidence to the contrary, should be reserved from disposition.

(4) On January 7, 1947, the Chief of the Indian Lands and Grazing Division directed a supplemental request for a report to the Director of Geological Survey requesting information as to whether the lands involved were valuable for any mineral deposits.

(5) On January 8, 1947, the Director of the Geological Survey replied to the Acting Director of the Bureau of Land Management that available information indicated that these lands were prospectively valuable for oil and gas and it was without value for other minerals."

This detailing of the evidence *omits* two important related matters. We refer to the fact that the statement in the October 29, 1946, Field Examiner's report that "the area has a prospective value for oil and gas," was predicated upon the fact that: ". . . In the distance may be seen the high derricks of oil companies, most of which have closed down owing to the difficulty of securing drill steel," the Field Examiner's report then saying: ". . . As might be judged from the presence of the oil derricks, and which is corroborated by the numerous abandoned casings where geophysical seismological exploration studies have been conducted, the area has a prospective value for oil and gas . . ." Thus despite the drilling of oil wells in the area and the extensive "geophysical seismological exploration studies," all in evidence in October, 1946, nevertheless as late as January 7, 1947, the second request for a report from the Geological Survey [subpar. (4) above] had noted that there were *no applications* pending for federal oil and gas leases upon the land. Yet such federal leases were grantable at that time under the Mineral Leasing Act of Feb-

ruary 25, 1920, 30 U.S.C. 181, et seq., for a mere $10.00 filing fee, plus payment of 25¢ per acre as a first year rental. In fact the evidence below shows that it was not until January, 1949, that a federal "give away" lease was (for the first time) granted as to these lands, and this was dropped in January, 1951, despite the right to renew at that time.

In any event, it is important to note that the two Geological Survey reports only stated that "available information *indicates*" the lands were "*prospectively* valuable" for oil and gas, and, the Field Examiner's report also spoke in terms of the *area* being "*prospectively* valuable" for oil and gas, while giving the basis therefor. Such was the evidence of mineral character which was submitted to the Secretary for his consideration.

EVIDENCE RELATING TO THE CLASSIFICATION BY THE SECRETARY. The evidence reflecting the submission of the matter to the Secretary of the Interior[1] and his action in "classifying" the land is reflected by two documents, a memorandum written by the Director of the BLM to the Secretary of the Interior, dated February 20, 1947, and a memorandum written by Lee Muck, Assistant to the Secretary in Charge of Land Utilization, to the Secretary, dated February 25, 1947. On February 28, 1947, Secretary Gardner dated and signed his approval to the Director's memorandum and wrote on the bottom margin thereof: "See Muck memorandum of 2/25." We reproduce the two documents, as follows:

1. The matter was actually submitted to Assistant Secretary Warner W. Gardner, under delegation of authority from the Secretary of the Interior by 43 C.F.R. § 4.0 (App., *infra*, p. 149). Hereafter we shall refer to him as "Secretary Gardner."

"Memorandum Feb 20 1947

"To: Secretary of the Interior

"From: Director, Bureau of Land Management

"Subject: Recommended classification of land under Section 7 of the Taylor Grazing Act, as amended, for private entry under application to purchase 011101.

"On July 17, 1946, John E. Pottharst filed a petition under Section 7 of the Taylor Grazing Act, as amended, for the classification for private entry under the act of July 5, 1884 (23 Stat. 103; 43 U.S.C. sec. 1072), of (here follows description of land), and deposited the sum of $2,402.02 in payment for the land.

"The land in question is one of the small unnamed military reservations in Louisiana which was abandoned and turned over to the Secretary of the Interior for disposition under the act of July 5, 1884, *supra*, or as otherwise provided by law.[1]

"This land remained unsold after two public sales and was subject to private sale until withdrawn by Executive order of February 5, 1935.

"The land Classification Division and the Branch of Field Examination of this Bureau have examined and cleared this application (B.L.M. 011101). In view of the character of the land and the fact that the record does not show others are interested in acquiring it, I recommend that the above described land be classified under Section 7 of the Taylor Grazing Act, as amended, for private entry under this application. If the application is allowed it will be made subject to a reservation of fissionable source materials in accordance to the act of August 1, 1946 (60 Stat. 755). Your approval hereof will constitute the classification of the land. See Nord-

1. The Executive Order of September 23, 1886, which placed these lands with the Secretary for disposition under the Act of July 5, 1884, *did not state* "or as otherwise provided by law."

land and Brooks, A-24530, motion for rehearing, February 3, 1947.

"Approved: Feb 28 1947 /s/ Fred W. Johnson
Director.

/s/ Warner W. Gardner

"Assistant Secretary of the Interior.

"See Muck memorandum of 2/25"
(in handwriting)

* * * * * * * * *

"Memorandum February 25, 1947

"To: Secretary of the Interior

"From: Lee Muck

"Subject: Mineral reservation in patent,
B.L.M. 011101.

"I have surnamed the attached memorandum recommending the sale of certain lands in Louisiana under the Act of July 5, 1884, after having been given verbal assurance by the Bureau of Land Management that the patent issued on these lands will contain a reservation of minerals, under applicable law. It appears that reference to such a reservation was omitted from the memorandum inadvertently.

/s/ Lee Muck
Assistant to the Secretary
in Charge of Land Utilization.

"Enclosure 151."

The opinion below (App., *infra*, p. 113) notes that Secretary Gardner "testified that the handwritten notation ("See Muck memorandum of 2/25") formed a part of his official act," and it further states Secretary Gardner's action, as above described, "constituted the classification of the land for sale."

These factors should be noted, as respects the Director's memorandum:

(1) It notes that Pottharst had applied to purchase the property under the Act of July 5, 1884 (the Muck memorandum so acknowledges) and he had deposited the purchase price;

(2) It in fact made provision for a mineral reservation of the fissionable source materials;

(3) The Director recommended the land be classified under the application;

(4) The Director stated: "*Your approval hereof* will constitute *the classification* of the land."; and

(5) Secretary Gardner *signed his approval* of the Director's memorandum *as written*.[1]

These factors should be noted, as respects the Muck memorandum:

(1) Considering the fact that *only* the Secretary could make the administrative decision that the lands were valuable for a particular mineral deposit, and the matter was being submitted to the Secretary *for the first time*, Lee Muck does not explain how anyone in the BLM could *assure* him that the patent would contain a reservation "under applicable law." It was the function and duty of the Secretary under Section 7 of the Taylor Grazing Act (App., *infra*, p. 144) to *classify* the land and *open* it for disposal "under applicable law," and until this was done no one knew what would be the "applicable" law;

1. The Secretary's copy of the Director's memorandum of February 20, 1947, disclosed that the Solicitor of the Department of the Interior (*cf.* 43 C.F.R. § 01.12, App., *infra*, p. 149) had approved the Director's memorandum *for signature* by the Secretary, in the face of the Muck memorandum.

(2) Lee Muck was in error in saying that a mineral reservation "was omitted from the (Director's) memorandum inadvertently," for the memorandum, in fact, made provision for a reservation of the fissionable source materials, and this was the only reservation as to which someone in the BLM could give him "assurances" for such a reservation was made *mandatory* by the Atomic Energy Act of 1946, and without any administrative decision that the lands were "valuable" therefor; and

(3) While Muck says he had "surnamed" the Director's memorandum of February 20, 1947, yet the Secretary's file copy of the memorandum, in the "surname" column did not include Muck's name, although it included the names of seven subordinates (including the Solicitor) who approved the Director's memorandum *as written*.

In connection with the above described action of Secretary Gardner, the opinion below (*infra*, p. 123) contains the following ruling:

> ". . . The Pottharst application was processed and classified under Section 7 of the Taylor Grazing Act and, acting under its terms, the Secretary determined that the United States could make a private sale of these lands under the 1884 Act so long as the valuable minerals thereunder were reserved to the Government under the 1914 statute . . ."

In connection with this ruling, it should be noted that neither of the quoted memoranda so much as *mentions the 1914 Act*. In fact, at the time of submission to Secretary Gardner, not a *single document* in the BLM file mentioned the 1914 Act. Furthermore, neither memoranda mentioned a single mineral deposit, much less reflecting an administrative decision by

Secretary Gardner that the lands contained a *valuable* mineral deposit of any kind. It was Secretary Gardner's duty and function under Section 7 of the Taylor Act (*infra*, p. 144) to make the classification, and, "open such land . . . for disposal in accordance with such classification under applicable public-land laws," and where in making the "classification" did he determine the lands were "more valuable or suitable" for disposition under the 1914 Act? And where did he "open" the lands for disposal under the 1914 Act? The only statute mentioned in the two memoranda is the Act of July 5, 1884, and, the only "classification" reflected by them, is the classification under the 1884 Act as the Director's memorandum clearly states.

From the opinion below (*infra*, p. 186) it is not clear as to the construction or significance placed upon the notation, "See Muck memorandum of 2-25." It was the position of petitioners that this marginal notation was written by Secretary Gardner *solely* for the purpose of calling the Muck memorandum to the attention of the Director of the BLM, since it was the Director who was to execute the final certificate based upon the action of Secretary Gardner in classifying the land. It was the Director's memorandum which Lee Muck stated to be in error, yet the conclusions of Lee Muck were highly questionable, if not in error, and the Solicitor as legal adviser to the Secretary had approved the Director's memorandum for signature by the Secretary *as written* and it was so approved. In calling the Muck memorandum to the Director's attention, and if it had merit, the Director could have proceeded under 43 C.F.R. § 296.13 (*infra*, p. 156) to have the classification revoked.

But in the final analysis we submit there is no room for the Court to speculate on the meaning or significance of the marginal "See Muck memorandum" notation, for the interpretation and action taken thereafter by the Director in light of such notation is conclusive. His action in this respect will be considered hereafter.

EVIDENCE AFTER THE CLASSIFICATION OF THE LAND. We earlier mentioned the so-called "mineral waiver" filed by Pottharst on March 10, 1947, and it was quoted (*supra*, p. 7). This document was filed *after* the Secretary had "classified" the land, and it was *voluntarily* filed by Pottharst without requirement by the BLM. It was the duty and function of the Secretary to "classify" and "open" the land for disposal under applicable law, and only he, or one possessing the Secretary's authority under Section 7 of the Taylor Act could change or modify the "classification." Indeed, the regulations under the Taylor Act (*infra*, p. 156), 43 C.F.R. § 296.13, specifically provided that: "The classification . . . will remain effective unless revoked . . ." Hence, if Secretary Gardner did not "classify" the land under the 1914 Act, but only under the 1938 Act, Pottharst was powerless to "classify" the land under the 1914 Act by the so-called "mineral waiver."

On March 25, 1947, the Director of the Geological Survey sent the following memorandum to the Director of the Bureau of Land Management, to wit:

"The Director, Mar 25 1947

"Bureau of Land Management:

"Reference is made to your request of January 7, 1947 (BLM 011101 "K"-La), to Survey reply thereto of

January 8, 1947, and to an informal request from Division K on March 24, 1947, for comment on the report of October 26, 1946, by Assistant Supervisor B. L. Heron, advising that, in the event of sale of the land in T. 21 S., R. 28 E., La. Mer., Louisiana, under consideration, deposits of sulphur and potash, as well as of oil and gas, should be reserved.

"Inasmuch as the oil and gas reservation heretofore recommended both by the Survey and by your field examiner is based on the possible presence in the land of one or more salt domes, in which type of structure the oil and gas are invariably associated with salt, not uncommonly with sulphur and rarely with more than traces of potash, I concur with the examiner's suggestion that sulphur and potash be included in the contemplated mineral reservation and now recommend that such reservation also include sodium.

For the Director,
/s/ J. D. Northrop

"Enclosure 30"

This document reflects that the two Geological Survey reports, together with the Field Examiner's report, were only "recommendations" that the oil and gas be reserved, and it discloses the purely speculative nature of such recommendations when it states that they were "based on the *possible presence* in the land of one or more salt domes."

The foregoing was then followed by the final certificate executed on March 25, 1947, by the Director of the Bureau of Land Management, which, as earlier considered, acknowledged that "in pursuance of law" Pottharst had purchased the land involved and made payment in full as required by law, concluding that Pottharst was entitled to receive a patent for the land. There appeared in the upper left-hand margin of

the certificate a notation of combined rubber stamp and handwriting, as follows:

> "Application made in accordance with and subject to the provisions and reservations of the Act of July 17, 1914 (38 Stat. 509) as to oil, gas, sulphur, potash & sodium, as amended by the act of March 4, 1933 (47 Stat. 1570)."[1]

It is the admissibility of this marginal notation, and, the interpretation thereof by the opinion below which forms the basis for one of the questions presented here. In this connection we direct the Court's attention to the regulations issued pursuant to the Act of July 17, 1914 (*infra*, pp. 154, 155), 43 C.F.R. § 102.27, and § 102.28, and we note particularly that the marginal notation provided by § 102.28 *was not affixed* to the final certificate by the Director when he executed same, and this is highly important as respects a consideration of the notation, "See Muck memorandum," which Secretary Gardner wrote on the lower margin of the Director's memorandum. For we submit the fact that the Director did not affix the marginal notation required by § 102.28 is entirely controlling.

The foregoing was then followed by the issuance of the patent to John E. Pottharst for the land, it containing the mineral reservation pursuant to the Act of July 17, 1914, which was quoted earlier herein. This patent commenced with the statement: "WHEREAS, a Certificate of the Director is now deposited in the Bureau of Land Management, whereby it appears that full payment has been made by the claimant John E. Pottharst . . . ," and it was acknowledged below that the certificate so referred to in the patent was the one just previ-

1. Immediately below was another typed marginal notation, to-wit: "Subject to Act of Aug. 1, 1946 (60 Stat. 755)."

ously discussed. The patent was dated April 22, 1947, *but was not delivered* until April 23, 1947, so that at the time of delivery the issuance thereof as containing the 1914 Act mineral reservation was an accomplished fact.

F. REASONS FOR ALLOWANCE OF WRIT AND SUPPORTING ARGUMENT

The United States stated to the Court below that: "The instant case presents *important questions of public land law* to this Court for the first time," and we fully agree with this statement. This case involves the interpretation and application of three federal land disposal statutes, the Act of July 5, 1884 (*infra*, p. 136, hereafter called the "1884 Act"), the Act of July 17, 1914 (*infra*, p. 141, hereafter called the "1914 Act"), and, Section 7 of the Taylor Grazing Act (*infra*, p. 144, hereafter called the "Taylor Act"). Of these three statutes, this Court has only had occasion to interpret one aspect of the 1914 Act, yet the opinion below is in conflict with that limited interpretation. The Taylor Act is now the foundation of the federal land disposal system, since it is now applicable to all disposals of public land by the government.[1] The opinion below, if allowed to stand, will be the controlling appellate interpretation of the Taylor Act, yet it was interpreted below in direct conflict with the terms and provisions thereof, and, contrary to the interpretation and application thereof by the Land Department. The 1914 Act is a highly important statute, yet the interpretation

1. A Land Department decision appearing at 61 I.D. 270, in commenting on one of the Executive Orders referred to in Section 7 of the Taylor Act, stated at p. 276: "However, all of the public lands in the named States having been withdrawn except from the operation of the Taylor Grazing Act, the operation of other public-land laws virtually ceased in those States . . ."

of Section 1 thereof in the opinion below is in conflict with the provisions of the statute and the regulations issued pursuant thereto as interpreted and applied by the Land Department. With the subsequent intervention of the Taylor Act, it is necessary that a determination be had as to the relationship between the 1914 Act, and, the Taylor Act, and here again we submit that the opinion below was in error in this respect. The foregoing matters present important questions of federal law which have not been but should be settled by this Court.

The opinion below on the "public lands" issue was in direct conflict with decisions of this Court, as well as those of another Circuit Court of Appeals. The same is true as respects the admissibility in evidence of the objected to marginal notation appearing upon the final certificate. The opinion below was also in direct conflict with decisions of this Court in failing to give controlling importance to the final certificate issued to Potthast. Finally, the opinion below as it interpreted the provisions of the 1884 and 1914 Acts concerning "valuable mineral deposits" was in direct conflict with the decisions of this Court prescribing the test to be applied for the determination of when lands contain "valuable mineral deposits."

I. The Question Of The Holding That These Lands Became "Public Lands" In 1886 When They Were Placed Under The Control Of The Secretary For Disposition As Provided For In The 1884 Act

The ruling by the Court below that these lands became "public lands" in 1886 is vital to the correctness of that decision, since the opinion acknowledged (*infra*, p. 126) that the 1914 Act was a "public lands" statute and thus applicable

only to "public lands." Additionally, Executive Order No. 6964 (*infra*, p. 158) only undertook to withdraw "public lands," and, the authority for that order was the Pickett Act, the Act of June 25, 1910 (*infra*, p. 147), and it only authorized the withdrawal of "public lands." Accordingly, if the lands were not withdrawn by Executive Order No. 6964 they did not in turn come under the provisions of Section 7 of the Taylor Grazing Act (*infra*, p. 144), as amended in 1936. By Section 6 of the Act of June 12, 1858 (*infra*, p. 136), Congress repealed all laws authorizing the sale of useless military sites and specifically *prohibited* their disposal by sale or preemption under any federal laws. At the time of this statute, sale and preemption were the only general land laws for the disposal of federal lands. It was against the background of the 1858 Act that Congress enacted the 1884 Act, directing the President (Section 1) to place abandoned military reservations under the control of the Secretary of the Interior "for disposition as hereinafter provided." We submit that when Congress, by the 1884 Act, directed that such lands be disposed of "as hereinafter provided," it necessarily authorized a disposition to the extent only as provided in the 1884 Act, and a disposition of such lands was precluded under any other statute or by any other means. Furthermore, as will be shown, the 1884 Act not only applied to a special and particular class of property but it was passed pursuant to a clear and pronounced congressional policy, it provided a special mode and procedure for such disposition, a method of disposal entirely in conflict with disposition under the general land laws. It was for the foregoing reasons that these lands did not become "public lands" in 1886.

In *Bardon v. No. Pac. R. Co.*, 145 U. S. 535 (1892), this Court defined "public lands" as follows, p. 538:

> ". . . The grant is of alternate sections of public land, and *by public land*, as it has been long settled, is meant such land as is open to sale or other disposition under *general laws* . . ."

In *Rawson v. U. S.*, 225 F. 2d 855 (C.C.A., 9th, 1955), *cert. den.* 350 U. S. 934, the Court said, p. 857:

> "The essential thing to note is that in the caption and throughout the Order the withdrawal related solely to the 'public lands.' As stated in Section 1 thereof, it affects 'any public lands' within the described area. Section 2 withdraws 'all vacant, unappropriated, and unreserved public lands within the above-described area.' The proviso at the close of Section 2, permitting prospecting and the location and exploitation of mineral lands, obviously has reference only to the pursuit of those activities on such of the lands as were public lands. Under the land laws mineral entries may be made only on lands forming part of the public domain, *that is, public lands of the United States subject to entry, sale, or other disposal pursuant to general law.* Cf. Newhall v. Sanger, 92 U. S. 761, 763, 23 L. Ed. 769; United States v. Holliday, D. C., 24 F. Supp. 112; and compare State of Oklahoma v. State of Texas; supra . . ."

This extract refers to *Oklahoma v. Texas*, 258 U. S. 574 (1922), and there this Court was concerned with the applicability of the mineral land laws to lands in Oklahoma, and after first noting that it would not apply to *all lands* owned by the United States this Court said (p. 600):

> ". . . *Only* where the United States *has indicated* that the lands are held for disposal *under the land laws does* the section *apply*; and it *never applies* where the United States directs that the disposal be only under other laws."

In *Clark v. Herington*, 186 U. S. 206 (1902), it was asserted the lands in question were "public lands" within the jurisdiction of the Land Department to dispose of, but in rejecting this contention this Court said at p. 209:

> ". . . While the lands were within the *jurisdiction* of the Land Department *for some purposes* they were not for all. *The mode of their disposal was limited*, and the Land Department had *no authority* to ignore that *limited mode* and *dispose of them in any other way*. This general doctrine as to the *limitation of the powers* of the Land Department has been affirmed by this court *in many cases and under different circumstances. Wilcox v. Jackson*, 13 Pet. 498; *United States v. Stone*, 2 Wall. 525."

In *West v. Work*, 11 F. 2d 828 (C.C.A., D.C., 1926), *cert. den.* 271 U. S. 689, the Court was concerned with a "public lands" law, the Mineral Leasing Act of 1920, and it was argued that Act "was the expression of a new national *policy*." In rejecting this argument, the Court said at p. 831:

> ". . . The Act of February 25, 1920, does not expressly repeal the provisions of said acts. Repeals by implication *are not favored*. The construction which more comports with reason is that the Act of February 25, 1920, *was not intended to and did not repeal the specific provisions of law regulating the disposal of lands within the State of Oklahoma*, including the lands in question, or *other specific provisions of laws as to particular parts of the public domains* . . ."

This Court should note particularly the closing statement in this extract.

Land Office "Instructions" appearing at 26 L.D. 87 noted the congressional "policy" behind the 1884 Act, saying (p. 89) that such lands in abandoned military reservations

had been "enhanced in value by the uses for which they had been reserved," and it was the policy of the government that it should receive the benefit of such enhanced value by sale to the highest bidder for cash. An opinion of the Attorney General rendered to the Secretary of the Interior at 14 L.D. 209 considered the Act of June 12, 1858 (*infra*, p. 136), which *prohibited* the disposal of abandoned military reservations, saying that by the 1858 Act Congress declared such lands could only be disposed of by Act of Congress. It then noted that by the 1884 Act Congress provided that such lands "shall be disposed in a certain prescribed manner," and that said Act repealed the earlier 1858 Act. In 1921, the Attorney General rendered a further opinion to the Secretary, 32 O.A.G. 488, saying with reference to the 1884 Act (p. 490): ". . . This department has repeatedly held *that lands reserved for military purposes can not be restored to the public domain without an Act of Congress . . .*"

A more detailed discussion of the 1884 Act appears in *State of Utah*, 30 L.D. 301 (1900), it said, p. 302:

> "Many of *the general land laws*, . . . authorize the entry and disposition of *public land* pursuant to their provisions, *but these laws do not*, any of them, contain a provision indicating *that the method of disposition therein authorized is exclusive of others*. Upon the other hand, . . . some *statutes of local or restricted application* contain provisions *unmistakably indicating* that the method of entry or disposition therein authorized *is exclusive of all others. Lands thus set apart for disposition in a particular manner, to the exclusion of all others, do not*, in the absence of some declared purpose to the contrary, *fall within the operation of subsequent laws which in general terms authorize the disposition of*

unappropriated public lands. Such lands are in a sense appropriated.

"The act(s) of July 5, 1884, . . . *(is) of restricted application and relate(s) only to abandoned military reservations.* Congress *could have directed* that upon the abandonment of a military reservation, the lands embraced therein *should be restored to the public domain for disposition generally under the land laws*, or should be subjected to disposition *only in a designated mode. The latter course was adopted.* The act of July 5, 1884, directed that whenever, in the opinion of the President, any lands within any military reservation had or should become useless for military purposes he should cause the same to be placed under the control of the Secretary of the Interior *'for disposition as hereinafter provided.' Then followed provisions for the survey, appraisement, and disposition of the lands . . .*[1]

". . . Because of *the enhanced value* of lands in abandoned military reservations, or because of other reasons growing out of their former use and surroundings, *it was deemed more conducive to the public interests to set them apart for disposition in certain designated modes, to the exclusion of all others, than to unconditionally restore them to the public domain* . . . In this sense *they are appropriated*—not disposed of in the sense of sold or its equivalent, *but set apart for disposition in a particular manner in pursuance of a defined policy. This appropriation* does not place the lands beyond the power of other disposition by Congress,

1. "Instructions" at 43 L.D. 33 noted the 1884 Act "provides a specific *method*" for disposal of the lands, which included appraisal and sale, at not less than the appraised value, and said (p. 35): ". . . *a method inconsistent* with disposition under the so-called free homestead law . . ." In the same vein is *No. Pac. Ry. Co.*, 38 L.D. 46, where in speaking of the 1884 Act, it said, p. 47: ". . . such lands were not subject to the company's selection, *mainly because the provision for appraisement amounts to an appropriation or dedication thereof to a particular use, and that they were therefore 'reserved'* . . ."

but, so long as it stands unaltered, controls the Secretary of the Interior . . ."[1]

Earlier *R. M. Snyder*, 27 L.D. 82, in discussing the 1884 Act, said at p. 86:

> ". . . where that branch of the government (Congress) has directed *that lands of a particular class or occupying a particular status shall be disposed of in a special manner*, such manner of disposition *is exclusive*, unless a contrary intention clearly appears, and the land department *is without authority to make a disposition of such lands other than in the way specifically provided.*
>
> "This land *is not* subject to disposition *under the general land laws*, nor under a private act, for the reason that Congress, in the exercise of its authority, *has directed otherwise.*"

In *Peter F. Kolberg*, 37 L.D. 453 (1909), the Land Department had held that the Isolated Tract Act, admittedly a "public land" statute, could be utilized in disposing of land that was a part of an abandoned military reservation, subject to the 1884 Act, as amended. But in *Floyd W. Warren*, 43 L.D. 181, the question presented was the applicability of the Isolated Tract Act to lands subject to a special statute, and the opinion (p. 182) states:

> ". . . The application was properly rejected, however, inasmuch as the area including this tract was opened *under a special or local law specifically providing the manner for the disposal of such lands. A complete system was provided for the offering of the lands* to entry in the first instance, and then for the disposal of the unsold lands through proclamation of the President,

1. Land Office opinions in a similar vein are found at 29 L.D. 572; 33 L.D. 413; 33 L.D. 130, 312; 35 L.D. 277, and 37 L.D. 667, dealing with presidential authority; see also 43 L.D. 181.

to be repeated at his discretion. It is therefore believed that *the general isolated-tract law may not properly be applied in contravention of the said special or local law governing the disposal of this area.* See Frost v. Wenie (157 U. S., 46, 58); and United States v. Healey (160 U. S., 136, 147)."

Following this extract, the Department then *expressly overruled* the prior decision in *Peter F. Kolberg.*

The extract above quoted from *Oklahoma, supra,* held that before lands would be subject to disposal under general land laws, there must be an "indication" that they were so held for disposal. Here these lands had been withdrawn in 1844 for military purposes, and before they could again become "public lands," they would have had to be "restored" to "public land" status. On the question of such a "restoral" the Land Department, expressly citing *Oklahoma v. Texas, supra,* in *Earl Greenlaus Hall,* 58 I.D. 357 (1943), said at p. 360:

". . . But it is not to be overlooked that the Supreme Court has also said that *before lands federally owned become subject to private appropriation there must be an indication* by the United States that the lands *are held for such disposal.*

"This latter statement, made in 1893, *epitomized land department views and practice, in particular as to 'restored' lands* . . . In a long line of decisions in such cases, the Department has held that *although restored lands become part of the public domain immediately, it remains for the Department and for it alone in the absence of congressional direction to give the 'indication' spoken of by the court and to determine when and how such lands shall be opened for disposal.*

"Not only this. The Department *has also held* that orderly administration of the land laws *forbids any departure* from the salutary rule that lands which have *once been*

> *segregated* from the public domain, whether by entry, patent, *reservation*, selection, or otherwise, *shall not* be subject *to any form of appropriation* until the local land officers, acting *under instructions from the Commissioner of the General Land Office*, shall have entered upon the records of the local office proper notation of the *restoration* of the lands to the public domain."[1]

The extract above quoted from the decision of *State of Utah, supra*, stated: "Lands thus set apart for disposition in a *particular* manner . . . *do not* . . . fall within the operation of *subsequent* laws which in *general terms* authorize the disposition of . . . *public lands*." The extract above quoted from the decision in *West v. Work, supra*, supports this conclusion. The extract above quoted from the Land Department decision in *Floyd W. Warren, supra*, specifically cited the decision of *Frost v. Wenie*, 157 U. S. 46, 58, in support of the proposition that the general Isolated Tract Act would not affect lands subject to a special statute, and the extract from page 58 in the *Frost* decision reads as follows:

> "Did Congress intend, by the act of December 15, 1880, *to open to entry by homesteaders, lands of the class which*, by the act of May 28, 1880, were opened to entry only by actual settlers having the qualifications of preemptors?

> "It is to be observed that although the words of the act of December 15, 1880, are broad enough, if literally interpreted, to embrace *all* the lands within the abandoned Fort Dodge military reservation north of the

1. A decision appearing at 14 L.D. 233, in speaking of the 1884 Act, said, p. 234: ". . . It will be seen *that said act does not authorize the President to restore said reservation to the public domain for settlement and entry under the land laws*, and it never has been so restored. * * * Inasmuch as said entry was allowed without authority of law, and upon land *not subject to entry*. . . . his entry must be canceled."

Atchison railroad, there are no words in it of express repeal of any former statute. It is well settled that repeals by implication are not to be favored. And *where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both.* In other words, it must not be supposed that the legislature intended by a later statute *to repeal a prior one on the same subject*, unless the last statute *is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject*, and, therefore, to displace the prior statute: . . ."

The foregoing shows that lands subject to a special Act will not be affected by a subsequently passed general statute and this rule of construction is supported by the two opinions in *Hemmer v. U. S.*, 201 F. 898 (C.C.A., 8th, 1912), affirmed *U. S. v. Hemmer*, 241 U. S. 379, 381, the Court of Appeals in *Hemmer* stating the rule as follows, p. 906:

"*The act of 1875 was a special law* on the subject of Indian homesteads, *limited* to a small and specific class of Indians. . . . *The act of 1884 was a general law on this subject of Indian homesteads.* . . . Privileges granted to a certain class by *special act are not affected by inconsistent general legislation*, unless a contrary intent of the legislative body is clearly expressed or indubitably inferable therefrom. But *the special act* and *the general law stand together*, the one as the law of the *particular class* and the other as *the general rule*. (citing cases)."

The rule was applied in the early decision of *Wilcox v. Jackson*, 38 U. S. 498, which said:

"In the first place, we remark, that *we do not consider this law* (Act of June 26, 1834) *as applying* at all to the case. *That* has relation to a sale of lands, in the

> manner prescribed *by general law*, at public auction, whilst the claim to the land in question is founded *on the right of pre-emption, and governed by different laws*. The very act of 19th of June 1834, *under which this claim is made*, was passed but one week before the one of which we are now speaking, *thus showing that the provisions of the one were* not intended to have *any effect upon the subject-matter* on which the other operated . . ."

The extract above quoted from the Land Department decision in *State of Utah, supra*, stated: "In this sense they are appropriated — . . . *set apart* for disposition in a *particular* manner in pursuance of a *defined policy*." In addition to the above rule, the *Wilcox* case laid down a further rule, saying p. 513:

> ". . . But we go further, and say, that whensoever a tract of land shall have been once legally *appropriated to any purpose*, from that moment, the land thus appropriated *becomes severed from the mass of public lands; and that no subsequent law*, or proclamation, or sale, *would be construed to embrace it, or to operate upon it; although no reservation were made of it*."

This rule was cited in *Hastings R. R. Co. v. Whitney*, 132 U. S. 357, 360, and, *U. S. v. O'Donnell*, 303 U. S. 501, 510.[1] And in *Northern Lumber Co. v. O'Brien*, 139 F. 614 (C.C.A. 8th 1905), the Court said at p. 616:

> "The words 'public land' have long had a settled meaning in the legislation of Congress, and, when a different intention is not clearly expressed, are used to designate

1. The opinion below (*infra*, p. 121), purported to distinguish the *Wilcox* case, but in doing so it *completely ignored* the holding in *Wilcox* first above discussed dealing with the "special — general statute" relationship, and its distinction treated *Wilcox* as standing *solely* for the rule of "appropriation."

> such land as is subject to sale or other disposal under general laws, but not such *as is reserved by competent authority for any purpose or in any manner*, although no exception of it is made . . . Wilcox v. McConnell (Jackson) . . ."

The foregoing authorities disclose four separate reasons as to why these lands did not become "public lands" in 1886, any one of which is sufficient to demonstrate the error in the opinion below. The opinion below (*infra*, p. 122, fn. 10) attempted to distinguish the 1884 Act, and the fact that it provided "the exclusive method" of disposing of 1884 lands, from the statutes involved in *Oklahoma, West* and *Clark*, by saying the statutes there involved "clearly provided *the exclusive* method of selling the lands affected by them." And the opinion says the 1884 Act was "only a permissive one which could be used by the Secretary *at his discretion*." The incongruity in this distinction follows from the fact that the opinion below has no difficulty in finding that the Mineral Leasing Act of 1920 provided "the exclusive method of disposing of" mineral rights of the United States, for in speaking (*infra*, p. 109) of the Leasing Act the Court said: "This statute specified that mineral leasing of the lands and mineral rights of the United States *was the exclusive method of disposing of such rights*." Yet under the Mineral Leasing Act of 1920 it is *entirely discretionary* with the Secretary as to whether he will or will not grant mineral leases upon federal lands [*cf. U. S. ex rel. McKennan v. Wilbur*, 283 U. S. 414, 418 (1931), and, *Haley v. Seaton*, 281 F. 2d 620, 625 (1960)], in the same precise

fashion as the Secretary had discretion under the 1884 Act to sell or not sell.[1]

But even accepting this effort to distinguish *Oklahoma, Clark* and *West*, here the Secretary *exercised* his discretion and agreed *to sell to Pottharst*, for the opinion below states (*infra*, p. 113): "On February 28, 1947 Warner W. Gardner, in the performance of his duties as the Assistant Secretary of the Interior, *approved* the February 20, 1947 recommendation *for the sale of these lands* by signing the letter of recommendation."

Having exercised his "discretion" to sell to Pottharst, the 1884 Act necessarily provided the "exclusive method" for the Secretary to dispose of the lands. Applicable is the decision in *McKay v. Wahlenmaier*, 226 F. 2d 35 (Ct. of App. D.C.), involving the Mineral Leasing Act of 1920, which admittedly gave the Secretary discretionary authority to lease or not. But the Court held that once the Secretary exercised his discretionary authority in favor of a decision to lease, he was then bound by the Leasing Act in granting the lease, saying at p. 17:

> ". . . Whether to offer land for lease *is a discretionary matter with the Secretary*. But, having invited applications for a noncompetitive lease, *he has no discretion* as to selecting the lessee; *the statute awards the lease* to the first qualified applicant. That is to say, *it is then the plain legal duty of the Secretary to perform the*

1. The very fact that lands subject to the 1884 Act were subject to disposition at the *discretion of the Secretary* is one of the precise reasons why such lands are not "public lands," for under all of the general land laws the land officers have *no discretion*, but to the contrary the private citizens, by virtue of the very terms of the land statutes themselves, *have a right* to acquire lands pursuant thereto.

merely ministerial act of issuing a lease to such applicant . . ."

The foregoing shows that the attempted distinction of *Oklahoma, West* and *Clark* by the opinion below is lacking in validity. Finally, it should be noted that the opinion below was obviously unable to distinguish the decision by the Supreme Court in *Hemmer* and made no mention thereof.

The opinion below, in support of its holding that these lands became "public lands" in 1886, relied (1) upon what it characterized (*infra*, p. 125) as a "rule of consistent administrative construction," and (2) upon four Court decisions (*infra*, p. 122). The "consistent construction" aspect of the opinion is predicated, primarily, upon Land Department "Instructions" at 43 L.D. 33, and, June 4, 1936, unreported "Instructions" (*infra*, p. 160). It is apparent that if these two sets of "Instructions" support the holding of the opinion below, then they are in direct conflict with those Land Department decisions above cited herein, and under these circumstances, this Court's decision in *U. S. v. Healey*, 160 U. S. 136, is controlling, and it was there stated, p. 145:

> "If, . . . the Interior Department had uniformly interpreted the act of 1877 . . . , we should accept that interpretation as the true one, if, upon examining the statute, we found its meaning to be at all doubtful or obscure. *But as the practice of the Department has not been uniform*, we deem it our duty to determine the true interpretation of the act . . . , *without reference to the practice in the Department* . . ."

It should be noted that the two sets of Land Department "Instructions" do not hold that lands subject to the 1884 Act become "public lands" immediately upon the President placing

them under the control of the Secretary for disposal in accordance with the 1881 Act. The rationale of the two sets of "Instructions" is the fact that in each instance they interpreted the subsequent general statute as evidencing the intent on the part of Congress that the particular statute involved should affect such abandoned military reservation lands despite the 1881 Act. The extract above quoted from *Frost*, in announcing the rule of construction that where two statutes cover, in whole or in part, the same matter stated: "it must not be supposed that the legislature intended by (the) later statute *to repeal a prior one on the same subject*, unless *the last statute is so broad in its terms* and so clear and *explicit in its words* as to show that *it was intended to cover the whole subject*" and thus displace the earlier statute. The above quoted extract from *Hemmler v. U. S.*, *supra*, stated that: "Privileges granted to a certain class by special act are not affected by inconsistent general legislation, *unless a contrary intent of the legislative body is clearly expressed or indubitably inferable therefrom.*" A mere reading of the two sets of "Instructions" will disclose that they purport to be an application of the "exception" as expressed in the foregoing quoted extracts. And this is manifest from a reading of the decision in *U. S. v. Blendauer*, 128 F. 910, which is cited and relied upon in both sets of "Instructions."

Thus the "Instructions" at 43 L.D. 33 involved the relationship of lands subject to the 1881 Act, to Section 24 of the Forest Preserve Act of March 3, 1891, and, the Act of June 11, 1906, and in each instance it was held that the later statute exhibited a "congressional intent" that it should apply to the lands in question, despite the 1881 Act. In the un-

reported 1936 "Instructions," such an "intent" was found in the 1910 Pickett Act (*infra*, p. 147). But it should be noted that the opinion below does not profess to find any like "intent" in the 1914 Act, but to the contrary it holds the lands here became "public lands" in 1886 by the mere placement under the 1884 Act, and thus subject to the 1914 Act because it was a "public lands" statute.[1]

It is necessary to digress here for a further consideration of the unreported "Instructions" of June 4, 1936 (*infra*, p. 160); for it was these "Instructions" which held that lands subject to the 1884 Act were withdrawn by Executive Order No. 6964 (*infra*, p. 158) and thus became subject to Section 7 of the Taylor Act (*infra*, p. 144). Order No. 6964 (1) only withdrew "public lands," and (2) the *authority* for the Order was the 1910 Pickett Act (*infra*, p. 147) and it *only authorized* the withdrawal of "public lands." But numerous decisions of this Court interpreting the 1910 Pickett Act make it quite clear that the 1910 Act was designed to "limit" the President's "withdrawal" authority to "public lands" as interpreted by decisions cited at the outset hereof. In the early case of *U. S. v. Midwest Oil Co.*, 236 U. S. 459 (1915), the Court, in discussing the legislative history of the Pickett Act, stated at p. 482:

1. The decision in *Anderson v. McKay*, 211 F. 2d 798 (C.C.A., D.C., 1954), rejected a similar contention of Land Department construction as to the applicability of the 1914 Act as respects an earlier statute, saying at p. 805: ". . . But, however that may be, *it is certain that to be given any effect an administrative construction must have been a ruling which can reasonably be held to have decided the point presently in issue.* The rulings cited to us by appellants *did not actually deal with the effect of the 1914 Act on the 1887 Act, either in fact or in language.* It is impossible, therefore, for us to say that those rulings constituted an administrative determination upon the point or an administrative construction of the statutes."

"When the bill came to the Senate it was referred to a committee and, as its members did not agree in their view of the law, two reports were made. *The majority*, after a review of the practice of the Department, the acquiescence of Congress in the practice and the decisions, reported that the President had a general power of withdrawal and recommended the passage of the pending bill *inasmuch as it operated to restrict the greater power already possessed* . . ."

That it so operated *to limit* such power was expressly recognized by the Land Department in *State of Utah v. Lichliter, et al.*, 50 I.D. 231, which states at p. 236: "The Act of June 25, 1910 (36 Stat., 847), pursuant to which the land now involved was withdrawn, was formal congressional recognition of this power *and was intended as a limitation thereof* rather than a grant *of greater authority*. United States v. Midwest Oil Co. (236 U. S. 459)." In *Payne v. Central Pacific Ry. Co.*, 255 U. S. 228 (1920), the Court said at p. 237: "The (Pickett) Act under which the subsequent powersite withdrawal was made is *confined* to '*public lands*,' a term *uniformly* regarded as not including (certain types of) lands . . ." In *Wyoming v. U. S.*, 255 U. S. 489 (1920), the Court said at p. 509: ". . . , following the recent decision in *Payne v. Central Pacific Ry. Co.*, *ante*, 228, that the Act of 1910, under which the withdrawal was made, is confined to '*public lands*,' . . ." And in *Haley v. Seaton*, 281 F. 2d 620 (1960), the Court held (p. 623) that the Pickett Act "authorized the *withdrawal only* of *public lands*." These authorities make it quite clear that the 1910 Act employed the term "public lands" in its strict conventional sense, as defined earlier herein in *Bardon v. Northern Pacific R. Co.*, *supra*. To interpret it otherwise and as being coextensive with "public domain" as done in the 1936

"Instructions" would not be to "restrict" the President's "withdrawal" powers, but to *enlarge* such powers. The 1936 "Instructions" were in error, for the 1910 Pickett Act *did not* extend to these lands subject to the 1884 Act, and being the authority and predicate for Order No. 6964 it necessarily limited such Order. Thus these lands did not come under Section 7 of the Taylor Act (*infra*, p. 144).

Certain of the Court decisions relied upon below involved instances where land had been removed from "public lands" status, and the subsequent "restoral" to "public lands" status. As respects the question of the required "indication" that lands are held for disposition under general law, of which *Oklahoma, supra*, spoke, the Land Department decision of *Earl Crecelouis Hall, supra*, noted that in the instance of a "restoral," it was for the Land Department "and for it *alone* IN THE ABSENCE OF CONGRESSIONAL DIRECTION to give the 'indication' . . . and to determine *when* and *how* such lands shall be opened for disposal." Thus these decisions must be examined in this context for certain of them were situations where Congress had by statute provided *the particular lands* should be held for disposition under general law.

We above quoted an extract from *Frost v. Wenie, supra*, and that extract considers the relationship between a special statute, the Act of May 28, 1880, and, the later Act of December 15, 1880. The particular lands involved had been a part of Fort Dodge reservation, but the part of the reservation lying north of the Atchison Railroad was abandoned by the preamble of the Act of December 15, 1880, and by the terms of the Act it was provided that *those specific lands* would be subject to homestead entry. Necessarily those specific lands were *ipso*

facto "restored" since Congress had made them subject to entry, and being so "restored" they were necessarily "public lands," *except* those lands in that part of the abandoned reservation (referred to as "Osage trust lands") which were subject to the prior special Act of May 28, 1880, and which the Court held were subject to disposition *only* under the special Act of May 28, 1880. This decision, *far from supporting the opinion below, is clear authority that a special statute which provides a limited mode of disposition for a particular class of property, will not be affected by later general legislation, and, lands subject to such special statute are not "public lands."*

Similarly, *Bardon v. No. Pac. R. Co.*, 145 U. S. 535 (1892), involved an Act of Congress which operated as a "restoral" to "public lands" status. In *Bardon* the question was whether lands subject to a preemption entry came under the railroad grant of "public lands," where the preemption entry was in effect at the time of the grant but was cancelled prior to the time the railroad filed the map of the location of the railroad with the Land Office, thus perfecting the grant. The Court, in holding that the grant would not encompass the land because the entry was in effect on the date of the grant, and was not "public lands" at that time, then said, in passing, at p. 539: "The cancellation (of the entry) only brought it (the land) within the category of public land in reference to future legislation." It is this statement upon which the opinion below relied in support of its holding. But the quoted statement is explained by the very terms and provisions of the preemption statute, and these are set forth in the later and factually similar decision of *No. Pac. Ry. Co. v. De Lacey*, 174 U. S. 622 (1898). Thus *De Lacey* quotes and considers the

1841 preemption statute, as supplemented by Section 5 of the Act of March 3, 1843, and Section 15 of the 1841 Act required the preemptor to perfect his preemption entry (as to "offered" lands) within twelve months "and if he or she shall fail to file such written statement as aforesaid, or shall fail to make such affidavit, proof and payment, within the twelve months aforesaid, *the tract of land so settled and improved shall be subject to the entry of any other purchaser.*" Similarly, the statute, as supplemented, provided that as to "unoffered" lands the preemptor should "make known their claims, in writing, to the register of the proper land office, within three months . . . , giving the designation of the tract and the time of settlement; *otherwise his claim to be forfeited and the tract awarded to the next settler*, in the order of time, on the same tract of land, *who shall have given such notice and otherwise complied with the conditions of the law*," and, further the preemptor of "unoffered" lands was required to perfect his entry prior to the public sale, "and if that right of privilege had not been exercised and the land was offered at public sale and not sold, *it then became subject to private entry by the first applicant*, . . ."

Since Congress, by the preemption statute, expressly provided that when the preemptor failed to perfect his entry, the lands would (upon forfeiture or cancellation) be subject to private entry by other claimants under the general preemption statute, — this explains precisely why the "segregation" by entry is terminated and the lands revert to "public lands" status, upon cancellation, and are again subject to private entry as "public lands," *for Congress has so expressly provided.*

The decision of *No. Lbr. Co. v. O'Brien*, 139 F. 614 (C.C.A., 8th, 1905), was factually similar to *Bardon*, *except* that it involved a withdrawal order in aid of a railroad grant rather than a preemption entry, and the Court *without* noting the factual distinction, simply cited and blindly followed *Bardon*, from which it quoted extensively. The decision *did not disclose* the Land Department order which terminated the original withdrawal of the lands, the Court merely saying, p. 617: ". . . the land was *released* from withdrawal, and thereupon became public in the fullest sense of the term; . . . The *release* simply restored it to the public domain and subjected it to future disposal under any law then applicable to it," citing *Bardon*. Aside from the matters above noted, it was customary procedure for the Land Department when a railroad grant of lands was fully "earned" and final lists had been submitted by the railroad, to approve the lists and *at the same time* to "restore" any surplus withdrawn lands. This is manifest from the reading of such a departmental order appearing at 10 L.D. 147, which is in the form of a directive or letter from the Secretary of the Interior to the Commissioner of the General Land Office, and it contemplated the precise situation as that in the *O'Brien* case where under a railroad grant withdrawal order, lands had been withdrawn in aid of the grant and later the lands were *released* from the withdrawal order and "restored" to the "public lands" status. The Secretary first discussed his approval of three lists of lands the railroad was entitled to receive under the grant, noting that such lands completely satisfied the grant to the railroad. He then (10 L.D. 147, 150) said there was no longer need to keep the remaining lands "withdrawn" under the original withdrawal order, and

directed that they be "restored" and "opened to settlement under general laws." Considering the Land Office practice as above disclosed and the fact that *O'Brien* does not disclose the terms of the order which "released" the lands from the withdrawal, it cannot be said that *O'Brien* is authority supporting the decision below, or, that it is contrary to or in conflict with the authorities above cited.

Finally, there is the decision in *Anderson v. McKay*, 211 F. 2d 798 (C.C.A., D.C., 1954), which is another instance of the Act of Congress specifically providing that the lands in question would be subject to disposition under general land law and as a result they were necessarily "public lands." The suit involved a claim to land pursuant to the "Land Grant Adjustment Act," the Act of March 3, 1887, Section 5 (*infra*, p. 146). Unfortunately the report of the case did not quote Section 5 in full, and had it done so it would be readily apparent that *Anderson* does not support the opinion below. The lands involved were thought to be encompassed in a railroad land grant to the Union Pacific Railroad, and even though the railroad had not "earned" title to the land, in 1879 the railroad conveyed it to an individual and it devolved to a party named Anderson, who went into possession in 1897, and he and his heirs farmed and occupied the land. The 1887 Act involved was a remedial statute passed for the purpose of aiding innocent purchasers who had purchased lands from the railroad under similar conditions, allowing them to make payment for the lands and receive a patent from the government therefor, no time limit having been imposed, but the "proviso" to Section 5 specifically provided that the section would not apply to lands settled upon subsequent to 1882 "by persons

claiming to enter same under the settlement laws of the United States." Thus by the very terms and provisions of this "proviso" in the statute, Congress had specifically provided that the general statutes in favor of settlers should continue to operate with reference to such lands, and this necessarily resulted in their continuing to enjoy the status of "public lands." Anderson did not take any steps to perfect his title under the 1887 Act, until July 20, 1936, however, prior thereto on March 2, 1936, an application for a federal oil and gas lease on the lands was filed under the Leasing Act of 1920. The Court noted that this Court had previously held that Section 5 of the 1887 Act was "not a curative (statute), confirms no title, but simply grants a privilege," and since the title to the lands had remained vested in the United States the Court held that Anderson's "privilege" under the 1887 Act had been modified by the 1914 Act, and, accordingly, Anderson was only entitled to a patent containing a reservation of the minerals under the 1914 Act. It is quite apparent that because of the "proviso" in Section 5 of the 1887 Act, and, the nature of Section 5, there could be no analogy between the situation involved in *Anderson* and the situation here where the lands were subject to the 1884 Act.

The foregoing demonstrates that the Court decisions relied upon in the opinion below simply do not support its holding that these lands became "public lands" in 1886. The authorities hereinabove discussed at the outset of this section of the petition disclose quite clearly that these lands did not become "public lands" in 1886, and such being the case they did not become subject to the 1914 Act under the specific holding of this Court in *Clark v. Herington*, *supra*, and under

that decision the Land Department had no jurisdiction to dispose of them under the 1914 Act. Similarly, these lands were not subject to withdrawal by Executive Order No. 6964 and hence they did not come under Section 7 of the Taylor Grazing Act. The opinion below on these points is clearly in error.

These lands not having been "public lands" when they became subject to the 1884 Act in 1886, there is the subsidiary question of the ruling in the opinion below (*infra*, p. 119, et seq.) that a patent was necessary to vest full title to these lands in John E. Pottharst. Section 1 of the 1884 Act had directed that these lands be placed under the control of the Secretary "for disposition as *hereinafter provided*," the 1884 Act prescribed *all* of the requirements for such "disposition," and when all the requirements of the statute had been met there had been a "disposition"[1] for the 1884 Act did not require a patent.

When Pottharst offered to purchase this property under the 1884 Act, he deposited the purchase price and at that time he had met all of the requirements of the 1884 Act. It remained only for the Secretary to exercise his discretion and determine if he would sell the property by accepting Pottharst's offer, such determination required that he also administratively determine (under Section 5) whether the lands contained valuable mineral deposits. When he accepted Pottharst's offer by approving the Director's memorandum, he necessarily determined the lands were not valuable for minerals, *West v.*

1. In *U. S. v. Morrison*, 240 U.S. 192, 202 (1916), the Supreme Court, in discussing its prior decision in *Ham v. Missouri*, said: ". . . Referring to the provision for the grant of equivalent lands, to take the place of those 'sold or otherwise disposed of,' the court said: 'Sale, necessarily signifying a legal sale by a competent authority, *is a disposition, final and irrevocable, of the land . . .*'"

Standard Oil Co., 278 U. S. 200, 211-213. Pottharst's title to the land and minerals was complete, and the subsequent issuance of the certificate *was merely the evidence* of the prior vesting of fee title in Pottharst and no patent was required.

In asserting this proposition, petitioners relied upon the decision by the Supreme Court in *Shaw v. Kellogg*, 170 U. S. 312. The opinion below with absolutely no mention of *Shaw* rejected this contention (*infra*, p. 120) and cited and quoted from the decision of *Carter v. Ruddy*, 166 U. S. 493.[1] The *Carter* decision related to a "public lands" statute, it involved "public lands," and the Court speaks of "legal title to *public lands*."[2] But here the opinion below holds that the 1914 Act supplies the requirement of a patent. We have, of course, just demonstrated that these are not "public lands" and for this reason the 1914 Act was inapplicable to the lands here, and when we discuss the 1914 Act hereafter we shall give additional reasons for its inapplicability to these lands.

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1. The opinion cited several other decisions, but they add nothing to *Carter*.

2. In quoting from *Carter*, the opinion very conveniently omitted the statement therein, at p. 495, which stated: ". . . the *general rule* is that a patent is necessary for the transfer of the legal title to *public lands* . . . Congress has the sole power to declare the dignity and effect of title emananting from the United States; and the whole legislation of the Federal government, in reference to the *public lands*, declares the patent is the superior and conclusive evidence of legal title . . ." An effort to trace the legislative statutes dealing with abandoned military reservations, discloses some five statutes covering the period from 1819 to 1949, and they show quite clearly that there has been no "policy" to require a "patent," but quite the contrary. *Cf.* Act of March 3, 1819 (3 Stat. 520); Act of April 28, 1828 (4 Stat. 264); the 1884 Act; Act of March 12, 1926 (44 Stat. 203, as amended); Act of June 30, 1949 (63 Stat. 378, Section 3, as amended).

The *Shaw* case was *after* the *Carter* case and cited it, and we submit it restricted the holding in *Carter* to "public lands" and "public lands" statutes. In *Shaw* the Court was concerned with a *special* location statute, and the "public land" statute in *Carter* was also a location statute, but whereas the location in *Carter* could be made on any "public lands," the Court in *Shaw* was particular to note the distinction as respects the special statute there involved, saying at p. 332:

> "It will also be perceived that Congress *did not permit* this *location* to be made *anywhere in the public domain*, but only within the limits of the Territory of New Mexico. *It was not like a military land warrant, subject to location upon any public lands*, but only a grant which could be made operative within *certain prescribed and comparatively narrow limits* — limits not even so broad as those of the territory ceded by Mexico . . ."

The decision in *Shaw* on the question here appears at p. 341, et seq., and during the course thereof, aside from citing *Carter*, the Court said:

> ". . . There is no magic in the word 'patent' . . . By it the legal title passes, and when *by whatsoever instrument* and in whatsoever manner that is accomplished, the same result follows *as though a formal patent were issued* . . . There was not at the time of these transactions . . . *any statute specifically authorizing* a patent for this land . . . as there was no statute in terms *authorizing a patent*, it was not within the power of the locators *to compel the issue of one*. No court would *by mandamus order* such issue in the *absence of* a specific and direct *statute requiring it*. * * * *All having*

been done that was prescribed by the statute, the title passed . . ."[1]

The lands here were not "public lands" and the 1914 Act was inapplicable here, hence *Shaw* is controlling, for the 1884 Act required no patent and the final certificate evidenced that "all (had) been done that was prescribed by the statute," — the 1884 Act. Pottharst could not compel a patent by mandamus.

II. The Subsidiary Question Of Disregarding Statutory Authority And Delegation Thereof, As To The Authority To Make An Administrative Decision, And, In Disregarding The Statutes And Regulations In Purporting To Find That An Administrative Decision Had Been Made

In *Boesche v. Udall*, 373 U. S. 472, 476, the Supreme Court held that when Congress passed land statutes, in the *absence* of *contrary direction*, the authority to administer such statutes was vested in the Secretary of the Interior. Accordingly, administrative *decisions*, to be authoritative, must be made by the Secretary or one possessing appropriate delegated authority, and in the Appendix to this petition (*infra*, p. 102, et seq.) we have set forth all of the appropriate regulations applicable to this case. The opinion below repeatedly undertakes to find that an administrative decision had been made, when the action was that of a subordinate to whom appropriate authority had not been delegated. This was particularly true with reference

1. The decisions in *U. S. v. George*, 228 U. S. 14, 19, and *Daniels v. Wagner*, 237 U. S. 547, 557-558, are to the effect that the Land Department is without authority to add to the requirements of a disposal statute enacted by Congress, and necessarily the Courts have no such power.

to the numerous findings of the opinion that a mineral determination had been made.[1]

The funds so deposited by Pottharst with his offer were kept and the Land Department was the administrative agency, under the direction of the Secretary, that administered or processed Pottharst's application. Accordingly, "due process" required that Pottharst's offer to purchase be administered and processed in accordance with the statutory law and the lawful regulations of the Interior Department issued pursuant thereto. In *Shepley v. Cowan*, 1875, 91 U. S. 330, this Court held at p. 340: ". . . If they (the officers of the land department) err in the construction of the law applicable to any case . . . , their rulings may be reviewed and annulled by the courts . . ." In *United States v. Heffner*, 1970, 420 F. 2d 809 (C.C.A., 4th), the Court said at p. 811: "An agency of the government must scrupulously observe rules, regulations, or procedures which it has established." The Court below in *Pacific Molasses Co. v. FTC*, 356 F. 2d 386, had this to say at p. 389: "When an administrative agency promulgates rules to govern its proceedings, these rules must be scrupulously observed . . ." This Court said in the early case of *Deffeback v. Hawke*, 115 U. S. 392, at p. 406: "The land officers, . . . are merely agents of the law . . ."

Aside from the question of the requisite authority, when the opinion below undertook to review the Land Office proceed-

1. The opinion (*infra*, p. 110) makes the unfounded statement that: ". . . The Geological Survey is the agency within the Interior Department charged with the responsibility of making the mineral determination of all public lands prior to their disposal." In *West v. Standard Oil Co.*, 278 U. S. 200, 220, this Court said: "*Authority* to determine as a fact the known *mineral character* of the lands falls naturally to the Secretary . . ."

ing *here*, if it could not point to a particular administrative decision made in clear and precise terms,[1] it was error for the Court to place a strained and distorted construction upon such proceeding in order to find that such a decision was had, where such "fathomed" decision would be contrary to the statute and regulations, and thus have operated to deny Pottharst "due process." The most pronounced errors in this respect were the Trial Court's (1) admitting in evidence the 1914 marginal notation appearing upon the final certificate issued to Pottharst, (2) then in construing such notation as "reflecting the decision of the Secretary to reserve the minerals under the 1914 Act," (3) disregarding the provisions of 43 C.F.R. § 102.27 and § 102.28, (4) in undertaking to find the administrative decision made that these lands were "valuable" for the *five reserved minerals*, and (5) these lands had been "classified" for disposal under the 1914 Act, in accordance with the Taylor Act.

III. The Question Of The Admissibility Of The Marginal Notation On The Final Certificate, Together With The Court's Construction Thereof

At the outset of this suit in the Trial Court, and before any responsive pleading had been filed by petitioners, respondents offered in evidence the final certificate issued to John E. Pottharst, and as offered it had in the margin thereof

1. As respects a mineral classification order of the Commissioner of the General Land Office, under the 1914 Act, and the *preciseness* thereof, the Court in *Brennan v. Udall*, 251 F. Supp. 12, had occasion to quote such an order (fn. 2, p. 15) and it *concluded* by saying: " 'Accordingly, I hereby *classify* the tracts listed below *as mineral lands, valuable* as a source of *petroleum and nitrogen*, and request that you make the proper notation *of the classification* upon your records.' "

the combination rubber stamp and written notation, to-wit:

> "Application made in accordance with and subject to the provisions and reservations of the Act of July 17, 1914 (38 Stat. 509) as to oil, gas, sulphur, potash & sodium, as amended by the act of March 4, 1933 (47 Stat. 1570)."

Petitioners objected to the marginal notation as being "undated, unsigned and unauthorized; it is not shown when, how, by what means or by what authority it was placed upon said certificate. Appearers further show that it forms no part of the certificate as an official record and that it is inadmissible in this proceeding," citing in support of the objection the regulations issued pursuant to the Act of July 17, 1914, appearing at 43 C.F.R. § 102.27 and § 102.28 (*infra*, pp. 154, 155). Additionally in support of their objection, petitioners cited the related cases of *Branson v. Wirth*, 84 U. S. 32, 43 and *Wirth v. Branson*, 98 U. S. 118, the first such decision ruling squarely upon unsigned and undated marginal notations appearing upon Land Office records, which ruling was reaffirmed in the second decision. In the first *Branson* decision, in commenting upon such a notation, this Court ruled with reference to its admissibility, both from the standpoint *of form*, and, *substance*, saying (p. 43), that: ". . . it is not known when it was made . . . ; nor is it known who made it, nor on what evidence it was made. Such a memorandum, *being no part of the record itself*, cannot be received *to contradict* the record . . . It is not the record of any act of the department, nor any document entitled to registry in its archives. It is nothing but a memorandum of a third party and *hearsay evidence* at best." This decision and the very extract therefrom which we have quoted, was cited and followed for the same proposition by the Supreme Court of Louisiana in

Slattery v. Heilperin & Leonard, 110 La. 84, 97, 34 So. 138. Thus, under F.R.C.P. 43, it is not admissible under rules of evidence applied in the Courts of the United States nor in the State Court of the forum.

The only justification for the overruling of petitioners' objection (*infra*, p. 119) is the following:

> ". . . as previously noted, the certificate itself contained the stamped notation that the sale was made subject to the 1914 statute, (fn. 8) . . . The notation is one specifically provided for in the regulations of the Secretary and, necessarily, it is valid evidence. While *it was not the one customarily placed on certificates*, it unquestionably reflected the decision of the Secretary to reserve the minerals under the 1914 Act."

We submit that this ruling was *error and the objection should have been sustained.* The opinion says *only* that the marginal notation "is one specifically provided for in the regulations of the Secretary" but the *only* source of any such authorization is 43 C.F.R. § 102.27 (*infra*, p. 154), and it *only authorizes* the notation for "*applications* to locate, select, enter, or purchase lands under the Act of July 17, 1914 . . ." We submit that an authorization to place upon an "application to locate, etc.," is *not authority* for the notation to be affixed to the final certificate. That it is not *authorized* for a final certificate is manifest from § 102.28 (*infra*, p. 155) for it *mandatorily requires* the affixing of an *entirely different* notation, if the certificate is issued under the 1914 Act.

The sole basis and foundation for the admissibility of "public records" is the "duty" imposed upon the public official, as held in *Ches. & Del. Canal Co. v. U. S.*, 250 U. S. 123, at p. 128:

> ". . . Thus, their character as public records required by law to be kept, the official character of their contents *entered under the sanction of public duty*, the obvious necessity for regular contemporaneous entries in them and the reduction to a minimum of motive on the part of public officials and employees to either make false entries *or to omit proper ones*, all unite to make these books admissible as unusually trustworthy sources of evidence . . ."

It is apparent from the foregoing that the ruling with reference to the marginal notation is entirely inadequate and thus erroneous, for the opinion could point to no "duty" imposed by the regulations to make the marginal notation appearing upon the final certificate. Merely because the notation might be authorized for a *certain document* will not supply either an authorization or a "duty" to make the notation *upon another document*. Not only was the notation inadmissible, but the Trial Court's error was further compounded by the erroneous ruling that such unauthorized notation "unquestionably reflected the decision of the Secretary to reserve the minerals under the 1914 Act." This latter error by the Trial Court is made mainfest from the fact that the final certificate *did not* contain the marginal notation required by 43 C.F.R. § 102.28 (*infra*, p. 155), if the 1914 Act was applicable.

Being "hearsay," what would be the only circumstance where the marginal notation here is admissible? *Wigmore On Evidence*, 3rd Ed., Vol. V, under the division dealing with "Official Statements: In General," in speaking of *the exception* to the "hearsay rule," has this to say, § 1633, p. 519:

> "(4) *The statement*—whether by register, certificate, report, or the like—*is admissible only so far as a duty exists* to make statements on the *specific subject-matter*.

> Hence a statement as to *matters not covered by the duty is inadmissible; this is conceded.* Conversely, the statement is admissible for all matters properly included in *the duty*, for the duty of statement extends to each and all of the facts as to which the official was bound to inform himself in order to make the statement . . .
>
> * * *
>
> "(6) *Since the assumption of the fulfillment of duty is the foundation of the exception,* it would seem to follow that *if a duty exists to record certain matters* when they occur, and *if no record of such matters is found,* then the *absence of any entry* about them is evidence *that they did not occur; . . .*"

This precise section of *Wigmore* was cited and relied upon in *Howard v. U. S.*, 278 F. 2d 872, 874 (C.C.A., D.C., 1960), and, *Olender v. U. S.*, 210 F. 2d 795 (C.C.A., 9th, 1954), also cited the Third Edition of *Wigmore* in support of the following statement:

> "Generally stated, the rule is that all documents prepared by public officials *pursuant to a duty imposed by law or required* by the nature of their offices are admissible as proof of the facts stated therein."

It was as respects 43 C.F.R. § 102.28 that the Trial Court committed further error, for that regulation imposed the mandatory "duty" upon the Director of the BLM to make the marginal entry provided thereby, if the final certificate was issued under the 1914 Act. The rule above discussed, as reflected by § 1633 of *Wigmore*, further provides that where a "duty exists to record certain matters . . . if *no record* of such matters is found, then the absence of any entry about them is evidence that they did not occur . . .," and this rule was also recognized in *Ches. & Del. Canal Co. v. U. S., supra.*

When the Director undertook to execute the final certificate, he had before him the BLM file and *all the evidence it contained* (and which the Court below undertook to evaluate) *at the time it was submitted* to Secretary Gardner for his administrative decision. But more important, the Director also had before him, his own memo of February 20, 1947, as approved by Secretary Gardner, with the marginal notation of Secretary Gardner to "See Muck memorandum of 2/25," and, he had the Muck memorandum also. Beyond this, if they have the significance attributed to them by the opinion below, the Director also had before him (1) the so-called "mineral waiver" and (2) the March 25, 1947 report of the Geological Survey.[1]

Such were the circumstances and evidence before the Director, when he undertook to execute the final certificate. In the performance of this act, 43 C.F.R. § 102.28 (*infra*, p. 155) *mandatorily* imposed the *duty* upon *him to determine* (and thus administratively decide) if the "final certificate(s) (was) issued to (a) nonmineral claimant(s) under this (1914) Act," and *if so*, then the Director was *required* ("will cause") to affix the marginal notation thereon, to-wit:

> "Patent to contain provisions, reservations, conditions, and limitations of the Act of July 17, 1914 (38 Stat. 509)."

The absence of the § 102.28 mandatorily required marginal notation, demonstrates conclusively that the Director administratively decided and concluded that the disposition to Pottharst *was not* pursuant to the 1914 Act, and hence the final

1. And, of course, if it were affixed to the final certificate at the time, there was the inadmissible marginal notation on the certificate, as a reminder of the 1914 Act, and, so-called "mineral waiver."

certificate was not to issue to Pottharst as a "nonmineral claimant(s) under this (1914) Act."[1]

The incongruity in the Trial Court's decision is this: The stamped notation, *which is not authorized for* the certificate, *is held* by the Court to "unquestionably reflect(ing) the decision of the Secretary to reserve the minerals under the 1914 Act," while the only stamped notation which the regulations *authorized* and *required* to reflect such *an interpretation on the part of the Secretary* does *not* appear upon the certificate, yet the Secretary in promulgating § 102.28 *prescribed the precise words* which would reflect any such decision on his part.

When the Land Office file relating to the Pottharst acquisition of the land here involved was introduced in evidence in the Court below, it could only serve as the basis for that Court to determine, as a *matter of fact*, what *authoritative* decisions were made on behalf of the Secretary. But in performing the final administrative act involving the final administrative decision of the issuance of the final certificate to Pottharst, § 102.28 required the Director of the BLM (the highest officer in the BLM) to consider the same BLM file and evidence, as was considered by the Trial Court below. The Director was required to determine as a *matter of fact* the same factual

1. That the Director was unquestionably correct in reaching this decision is manifest from the fact that neither his memo of February 20, 1947, as approved by Secretary Gardner and/or the Muck memo, *so much as made mention of a single one of the five reserved minerals*, much less did they contain a finding or determination that the lands were "valuable" therefor. Furthermore, neither such document so much as made mention of the 1914 Act, in fact, and *at the time of submission* to Secretary Gardner, *not a single document* in the BLM file (including the Director's memo and the Muck memo) made mention of the 1914 Act.

matter that the Trial Court was called upon to determine, and, *from the same evidence.*

Thus when the Court below held that, factually, the final certificate was issued pursuant to the 1914 Act, it substituted its judgment for that of the Director of the BLM, — since the Director *did not affix* the § 102.28 required marginal notation. This the Court did, while it accused petitioners (*infra*, p. 117), incorrectly, of "here challenging a factual determination made by the Secretary many years ago. Public land law dictates that any question of fact decided by the Secretary is conclusive and is not open to relitigation in the courts. *Burfenning v. Chicago, St. P. M. O. Ry. Co.*, 163 U. S. 321 (1896); *DeCambre v. Rogers*, 189 U. S. 119 (1903); *St. Louis Smelting and Refining Co. v. Kemp*, 104 U. S. 636 (1882)."

The marginal notation upon the certificate was clearly inadmissible and the failure of the opinion below to sustain petitioners' objection is in direct conflict with this Court's decisions in *Branson v. Wirth* and *Ches. & Del. Canal Co. v. U. S.*, both *supra*, as well as the decisions of the Circuit Courts in *Howard v. U. S.* and *Olender v. U. S.*, both *supra*.

IV. The Question Of The Final Certificate Issued To Pottharst Controlling The Patent And Rendering The Mineral Reservation Null And Inoperative

The final certificate acknowledged that Pottharst had purchased the property (including the minerals) making payment therefor, and that he was entitled to a patent. We have just demonstrated that the marginal notation thereon was inadmissible and it could not contradict or nullify the terms and provisions of the certificate. The very patent issued to Pott-

harst commences by reciting as the authority therefor the certificate which had previously been issued to Pottharst. The decision of this Court in *Ballinger v. Frost*, 216 U. S. 240, 250, held that the issuance of a patent was a ministerial function, enforceable by mandamus, citing some four prior decisions of this Court to that effect.

The early case of *Carroll v. Safford*, 44 U. S. 500, states at p. 523: ". . . Now, lands which have been sold by the United States can in no sense be called the property of the United States. They are no more the property of the United States than lands patented. So far as the rights of the purchaser are considered, they are protected under the patent certificate as fully as under the patent . . . When sold, the government, until the patent shall issue, holds the mere legal title for the land in trust for the purchaser . . ." *Cornelius v. Kessel*, 128 U. S. 456, says at p. 461: "By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it. (p. 463) . . . The interest of Davidson in the tract, which embraces the premises in controversy, acquired by him by his entry, was not lost or impaired by the order directing its cancellation. That order was illegally made, and those claiming under him can stand upon the original entry and are not obliged to invoke the subsequent reinstatement of the entry by the Commissioner . . ." *Simmons v. Wagner*, 101 U. S. 260, says at p. 261: "Where the *right to a patent* has once become *vested* in a *pur-*

chaser . . ., it is *equivalent*, so far as the government is concerned, to a patent actually issued. . . ," and at p. 262: ". . . if *the final certificate* in this case was genuine and valid, as, in effect, it has been found to be . . . After the certificate issued the lands were no longer *in law* a part of the public domain, and the *authority* of the officers of the government to *grant them otherwise* than to *him*, . . . was gone . . ." And in *Orchard v. Alexander*, 157 U. S. 372, the Court said, at p. 383: "Whenever, in pursuance of the legislation of Congress, *rights have become vested it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer*, even the Secretary of the Interior, the head of a department . . ." Most of the foregoing decisions are reviewed in *Ballinger v. Frost, supra;* see also *Trumbull v. Sample*, 158 La. 629, 104 So. 479.

In *Deffeback v. Hawke*, 115 U. S. 392, in speaking of the question of a reservation in a patent, the Court said, p. 406: "The land officers, who are merely *agents of the law*, had *no authority* to insert in the patent any other *terms* than those of conveyance, with recitals showing a compliance with the law and the *conditions which it prescribed*," holding that since the applicable statute did not authorize a reservation, none could be inserted in the patent. This decision was followed, applied and elaborated upon in the later case of *Burke v. Southern Pacific R. R. Co.*, 234 U. S. 669.[1] The *Burke* decision is of special significance here, for in *Burke* (1) the patentee *expressly agreed* to the mineral exception being inserted in the patent, and (2) expressly agreed to be bound thereby, yet the

1. Under similar circumstances, the Supreme Court of Louisiana reached the same result in *Trumbull v. Sample, supra.*

Court held this not to be binding on the patentee, nor could it estop the patentee. This disposes of the so-called "mineral waiver."[1] It is important to note that the decision in *Burke* was reached despite the fact that the United States was not a party to the suit.

If a patent were necessary here, as a matter of law, the foregoing decisions disclose that the patent issued to Pottharst was based upon and controlled by the certificate previously issued to Pottharst, and the certificate acknowledged Pottharst had purchased the land and minerals. The certificate being the authority for the ministerial function of issuing the patent, and, the mineral reservation inserted therein being unauthorized by the certificate, it was a nullity and inoperative as such. Hence the patent vested Pottharst with the fee title to the land and disputed minerals, and the failure of the opinion below to so hold is in direct conflict with the decisions of this Court above discussed.

V. The Question Of The Applicability Of The 1914 Act To These Lands, Its Interpretation, And, Whether It Was Administratively Applied To These Lands

The opinion below concedes (*infra*, p. 126) the 1914 Act was a "public lands" statute and we have demonstrated earlier that these lands were not "public lands." There are several additional reasons here for the inapplicability of the 1914 Act to these lands.

1. With no mention of *Deffeback*, the opinion below (*infra*, p. 118) undertook to distinguish *Burke* because it was prior to the 1914 Act. This is error, the 1914 Act *could not* apply, it was not *administratively applied*, and the final certificate is conclusively controlling.

In addition, these lands being subject to disposition under the 1884 Act at the *discretion* of the Secretary, they would not come under the 1914 Act. Thus Section 1 of the 1914 Act reads in part: "Lands, etc. . . . , shall be subject to appropriation, etc. . . . , *if otherwise available*, under the nonmineral land laws of the United States . . ." As respects the question of what is meant by "available," the first regulations, 43 C.F.R. § 102.23 (*infra*, p. 151), issued under the 1914 Act, provide in part:

> "102.23 *Lands to which Act of July 17, 1914 is applicable.* The Act of July 17, 1914 is *general* and comprehensive and operates in all the States containing *public lands* of the character specified. *It does not apply* to lands in the Territory of Alaska, *or to lands* in the United States *which for other reasons are not available or which*, in other words, *are not subject to entry* . . ."

This states that the Act *does not apply* to lands "which for other reasons *are not available*," and it particularizes such "unavailability" as being lands which "are not subject to entry." The lands here involved were not "subject to entry" because their disposition *was discretionary with the Secretary*, thus rendering them "unavailable." The term "subject to entry" has a technical meaning, referring to statutes which give a citizen *a right to enter* land, for where there is a "right" to "enter" land, the Land Department and Secretary *have no discretion*. *United States v. Buchanan*, 232 U. S. 72 (1914). In *Bowlby v. Hays*, 34 L.D. 376, the Secretary said, p. 380:

> "All unreserved and unappropriated *public land* is subject to disposal under the acts of Congress and in the modes thereby defined. Until such land is *entered* it is subject to appropriation by the first legal applicant,

and the land department is not authorized to exclude public land from appropriation of a legally qualified applicant[1]. . . ."

A further reason why these lands were not subject to disposition under the 1914 Act, is the fact that such lands were not "agricultural" lands, for it was conceded that such lands were "salt-water marsh" lands, without agricultural value. The "title" of the 1914 Act provides in part: "An Act to provide for *agricultural entry* of lands withdrawn, classified, etc." In the only decision where the 1914 Act has been considered by this Court, *Kinney &c. Oil Co. v. Kieffer*, 277 U. S. 488, this Court expressly referred to the *title of the Act* in limiting a claim for damages caused by a lessee, under Section 2 of the Act, saying at p. 505:

> ". . . The only compensation which he rightfully may demand is, as the act of 1914 says, for 'damages caused' by the mining operations. The sentence next preceding that in which these words occur makes it fairly plain that they refer to damages to 'crops and improvements,' and *the title of the act*, coupled with the reference to 'crops' shows that 'agricultural' improvements are the kind intended . . ."[2].

1. In speaking of the prohibition against entries upon lands subject to the 1884 Act, 9 L.D. 104 states at p. 105: ". . . It seems to be conceded by counsel for appellant, *and it is at any rate, clear, that entries and settlements on said lands are not authorized* by said proviso *after said lands have been*, pursuant to section one of the act, *turned over* by the President to the Secretary of the Interior *for disposal as provided in section two of the act* . . ."

2. In the Land Department decision of J. C. *Aldrich*, 1946, 59 I.D. 176, in speaking of the 1914 Act and its possible applicability, the following statement appears at p. 188: ". . . It is by no means clear that this act, which is entitled 'An Act to provide for *agricultural* entry of lands withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic minerals' (prior emphasis theirs), is applicable to *a tract of sandy beach* which Aldrich described in his petition for classification as 'nonagricultural.' . . ."

That the 1914 Act was only intended to apply to "agricultural lands," is manifest from the legislative history. The Chairman of the House Committee on Public Lands, in explaining the bill to the House in connection with proposed amendments, had this to say:

> "MR. MONDELL. I thank the gentleman for the suggestion. It is all of that. Our fathers departed from that plan. I do not think we should dispose of lands *in fee simple for agricultural purposes* that do unquestionably or probably contain valuable minerals, . . . But if you are going to depart from the principle in this bill, *which is the principle in the coal bill which passed a couple of years ago, there is no logical middle ground* . . ." (63rd Cong. Rec., Vol. 51, p. 10494)

These lands not being "agricultural" lands, the 1914 Act could in no event apply thereto.

In addition, there is the fact that the 1914 Act *alone* is not a disposal statute but it can only be *combined* with one of the general "public land" statutes providing for the disposition of "agricultural" lands. Because of this fact, the 1914 Act could not be combined with the 1884 Act in order to effect a disposition of land, due to the provisions of Section 5 of the 1884 Act which provide that in the event the land contained valuable mineral deposits, then the land was to be disposed of "*exclusively* under the mineral-land laws." Thus were the lands found by the Secretary to contain mineral deposits, still Section 5 not only *required* that the land in its *entirety* (including minerals) be disposed of under the mineral-land laws, but it *further required* that the disposition be *entirely free* of *any* of the provisions of the 1884 Act, which would necessarily

include the provisions for appraisal, two public offerings, and, a private sale at the appraisal price, and the 1914 Act, of itself, could not supply these necessary requirements in order to have a disposal.

Thus, because of the use of "exclusively" in Section 5 there is an irreconcilable conflict between the two Acts, and the opinion below does not meet the issue presented when it stated (*infra*, p. 123): "The construction contended for by defendants is contrary to several decisions construing statutes that dealt with 'minerals' or 'mineral laws.' Many courts have applied subsequent legislation in construing statutes of this kind," for the question here is the *conflict* between the provisions of Section 5 of the 1884 Act, and, the 1914 Act. For if it be conceded that the use of mineral-land laws in Section 5 comprehends future mineral laws, it does not follow that it comprehended *all* such laws, and it cannot be said it comprehends a law such as the 1914 Act when the very terms and provisions of Section 5 precludes a combination of the two statutes. The only manner in which the two statutes could operate in conjunction with each other, is to find in the 1914 Act a repeal of the word "exclusively" as contained in Section 5 of the 1884 Act. But the opinion below does not find that the 1914 Act repealed any part of the 1884 Act, and in view of the rule announced in the decision of *Frost v. Wenie*, *supra*, and the two *Hemmer* decisions, *supra*, all of which were discussed at the outset of this petition, there was no repeal.

Both Congress and the Land Department have construed a statute similar to the 1884 Act as not contemplating the 1914 Act. By the Act of May 17, 1884, the "mining laws"

of the United States were extended to Alaska,[1] yet the Land Department in the very first regulations issued under the 1914 Act, 43 C.F.R. § 102.23 (*infra*, p. 151), expressly stated with reference to the Act that: "It does not apply to lands in the Territory of Alaska . . ." In fact, it was necessary for Congress to pass a similar Act applicable to lands in Alaska, i.e. the Act of March 8, 1922 (42 Stat. 415, 48 U.S.C. 376), and as noted in the regulations issued pursuant thereto, 43 C.F.R. § 66.1: "*The Act constitutes, therefore, an extension to the Territory of Alaska of the principles of the surface homestead acts already in force in the public-land states, namely, the Act of . . . and July 17, 1914.*"

Aside from the foregoing, there is the question of the intervention of Executive Order No. 6964 (*infra*, p. 158) and the Taylor Act. The opinion below, while holding these lands became "public lands" in 1886, yet at the same time it also holds that they were "withdrawn" by Order No. 6964. Thus, if they came under Order No. 6964, they were no longer "public lands," but "withdrawn" lands, and as "withdrawn" lands the 1914 Act would no longer be applicable thereto, *until* the Secretary pursuant to the Taylor Act (*infra*, p. 144) "classified" the lands and "opened" them for "disposal" under "applicable public land law(s)," i.e. the 1914 Act. The foregoing is clear from the very terms of the Taylor Act, and the Land Depart-

1. As stated in *Meydenbauer v. Stevens*, 78 F. 787 (D. C. Alaska, 1897), at p. 789: ". . . *By the act of May 17, 1884* (23 Stat. 24, Supp. Rev. St. p. 433), whereby a civil government was established for Alaska commonly known here as the 'Organic Act,' *the provisions of the mineral laws of the United States were extended to Alaska.* Consequently the acts of congress, relating to the location and possession of mining claims, are the law of this territory on that subject . . ." The subsequent Act of June 6, 1900, Sec. 26, 31 Stat. 329, was similar to the Act of May 17, 1884.

ment has held precisely this, in *David B. Morgan*, 60 I.D. 266. There, in speaking of lands sought to be acquired under a "public lands" statute, the opinion states, p. 270:

> ". . . Neither may it be *land that has been reserved or withdrawn* by the Government for some public use or purpose, *because such land is regarded in law as segregated from the mass of public lands* and appropriated to such use or purpose until it is restored to the public domain. Today, *the public lands* in 24 States, including Arizona, *are withdrawn, reserved, and appropriated to the uses of the Taylor Grazing Act* (43 U.S.C., 1946 ed., sec. 315 *et seq.*) *and of the two Executive orders designated in section 7 of the act. Not until* the lands in these States *are restored to the public domain pursuant to section 7* of that act do they become unappropriated lands, *subject to entry under the disposal statute applicable to the classification assigned to them.* Nor, in the past, has the opening of an area *for a particular type of disposal* in furtherance of an indicated policy been considered *an opening of the area for other types of disposition under the general land laws.*"

Previously, in *J. C. Aldrich*, 59 I.D. 176, the Land Department held that the 1914 Act was subject to the "classification" procedures of Section 7 saying: ". . . it is plain this (1914) act *has been modified* by section 7 of the Taylor Grazing Act." The correctness of the foregoing is manifest from the very provisions of Section 7 of the Taylor Act, for it states that: "Such lands shall not be subject to disposition, settlement, or occupation until *after* the same *have been classified and opened to entry*: *Provided*, That locations and entries under *the mining laws* . . . , may be made upon such *withdrawn and reserved areas* . . ." This provision specifically provides that such "withdrawn" lands are not "subject to disposition," and, characterizes them as "withdrawn and reserved areas."

The foregoing shows quite clearly that these lands were no longer subject to the 1914 Act, and *would not* be subject thereto until the Secretary, pursuant to the Taylor Act, "classified" them under the 1914 Act. *The question of any such "classification," etc. will be considered hereafter when we deal specifically with the Taylor Act.* But we here return to a further consideration of the 1914 Act, bearing in mind that its application here would have to have been in the context of "classification," etc. under the Taylor Act.

Section 1 of the 1914 Act limits the applicability thereof by the opening clause, to-wit: "Lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, *or which are valuable for those deposits . . .*" It was conceded below that these lands *were neither* "withdrawn" nor "classified," for any of the named deposits. For the Act to apply here in any event, it would be necessary *for the Secretary* to make an *administrative decision* that these lands were "valuable for those deposits" as named in the statute, *and we emphasize that the Secretary was required to specify by name, the five mineral deposits here disputed. Until this administrative determination was made by the Secretary, the 1914 Act would not be applicable, under its very terms and provisions.* The test to be applied for such determination is stated in *U. S. v. So. Pac. Co.*, 251 U. S. 1, p. 13:

> "After considering all the evidence, we think it is adequately shown that the lands were known to be *valuable for oil* when the patent was sought and obtained, and by this we mean that *the known conditions at that time were such as reasonably to engender the belief that the lands contained oil of such quality and in such quantity as would render its extraction profitable and justify*

expenditures to that end. See Diamond Coal Co. v. United States 233 U. S. 236."

This test for mineral value contemplates two factors: "that the known conditions at (the) time were such as reasonably to engender the belief (1) that the lands contained oil," and (2) "oil of *such quality* and in *such quantity* as would render its extraction *profitable* and *justify expenditures* to that end." In *John M. DeBevoise*, 1960, 67 I.D. 177, it was conceded "that there are minerals present in the land," but the contention was that the land was "not valuable for its mineral deposits." In holding the lands did not contain *valuable* mineral deposits, it was stated at p. 179:

> "* * * The exceptions of mineral lands from preemption and settlement and from grants to States for universities and schools, for the construction of public buildings, and in aid of railroads and other works of internal improvement, are not held to exclude all lands in which minerals may be found, *but only those where the mineral is in sufficient quantity* to add to their richness and *to justify expenditure for its extraction, and known to be so at the date of the grant.*'"[1]

In stating the "facts" here involved, we quoted the Director's memorandum, and the Muck memorandum, detailing the action taken by Secretary Gardner in connection there-

1. In *U. S. v. State of California*, 55 I.D. 121, Secretary Ickes reviewed the various Court decisions, concluding by saying (p. 175): ". . . *U. S. v. So. Pac. Co.* probably affords the best general statement of the rule," and (p. 181) he noted a highly important element in determining "value," was the lands' *potential* for "immediate acquisition for future development." This is extremely important here, for the evidence shows there were no applications on January 7, 1947, for "give away" federal leases, as to all or any part of these lands, despite the conditions in the "area" of the land in October, 1946, as described in the Field Examiner's report.

with. The opinion below *concludes* therefrom (*infra*, p. 123) that: ". . . The Pottharst application was processed and classified under Section 7 of the Taylor Grazing Act and, acting under its terms, the Secretary determined that the United States could make a private sale of these lands under the 1881 Act so long as the valuable minerals thereunder were reserved to the Government under the 1914 statute . . ." We submit that this conclusion is simply not justified from the two memoranda, and, the action of Secretary Gardner taken in connection therewith, nor if justified, such conclusion would not be sufficient as the required determination that these lands were *valuable for deposits of oil, gas, sulphur, potash and sodium* so as to render the 1914 Act applicable. As respects an administrative action by the Secretary here, we submit the decision of *West v. Standard Oil Co.*, 278 U. S. 200, 213-214, is applicable, as summarized in the syllabus thereto: "That, assuming the Secretary had power to decide the question of known mineral character conclusively and thus end the jurisdiction of the Department over the land, *the making of this finding of fact can not be implied* in support of his order, . . ."

The preciseness with which administrative determinations must be had is illustrated by the decision in *Barash v. Seaton*, 256 F. 2d 714 (C.C.A., D.C.). In *Barash* the question was whether on June 5, 1953, certain federal lands were subject to competitive leasing, in accordance with the Leasing Act (30 U.S.C. 226), viz: "are within any known geological structure of a producing oil or gas field." The Secretary had *expressly delegated* the authority to the Geological Survey *to make* this statutory determination and to outline the boundaries of the structure on maps to be filed in the appropriate field

offices. The Land Office *practice* was to give public notices of such determinations in the Federal Register. The *only action* taken by the Geological Survey was to report, on June 12, 1952 (almost a year prior to the controlling date), that the "records of the Geological Survey disclose that this land *may* be subject to drainage of its oil and gas content as the subject area is on the southern edge of the Panhandle field," the report then concluded: "the Geological Survey *recommends* that the oil and gas rights . . . within the area involved be offered for lease in accordance with the competitive leasing provision : . ." (Court's emphasis) Following the controlling date of June 5, 1953, the BLM requested the Geological Survey to advise "as to the date on which this land *was determined* to be within the known geologic structure of the Panhandle Field" and if such determination was as *to all* of the lands involved. In reply (on February 11, 1955) the Acting Director of the Geological Survey replied:

> "'As of June 12, 1952, when the Geological Survey reported that the Lake McClellan Park Lands "may be subject to drainage," *no determination had been made as to whether all of the lands were or were not within a known geologic structure.*
>
> "'A review of the structural aspects of the lands involved has been made as of June 5, 1953; the date of filing of [appellant's] application. This review shows *that part of the lands* on which competitive leases were sold in July 1953, *are not within a known geologic structure* as those limits were deemed to exist on June 5, 1953.
>
> "'The lands *believed to be* within the known geologic structure are confined to surveys (sections) 9 and 10 of the subdivision of the Rockwell County School Land, Gray County, Texas [totaling 335.90 acres]. *The remainder of the lands* [totaling 618.61 acres] *were not* within a known geologic structure on June 5, 1953.'"

The Government, in an effort to sustain the foregoing action of the Geological Survey, argued (p. 717) that, "while the Survey's memorandum of June 5, 1952 merely 'recommends' competitive leasing, in reality the Survey 'found that it is within the known geologic structure [etc.].' Otherwise, says appellee, 'one [would have to] assume that the Survey did not know its function under the law, or that, if it did know it, was refusing to discharge it, neither of which assumption is at all tenable.[1]' " The Court rejected this argument, saying, p. 717:

> ". . . The provisions of the law and regulations *are too clear and unambiguous* to permit reliance on such *speculation*. McKay v. Wahlenmaier, 1955, 96 U. S. App. D. C. 313, 226 F. 2d 35; see also Harmon v. Brucker, 1958, 355 U. S. 579, 78 S. Ct. 433, 2 L. Ed. 2d 503."

And in holding there had been *no statutory determination* of a known geological structure, the Court continued by saying:

> "These *provisions require* (1) a *determination* by the Survey that *the lands* 'are' within a known structure, and (2) the filing of a map reflecting *this determination* in the definition of the structure. These requirements *were not observed* in respect of either the parcel of 618.81 acres or the parcel of 335.90 acres. Even with respect to the latter parcel, the *belated 'determination'* in the Survey's February 11, 1955 memorandum *stated only* that these are 'lands *believed to be* within the known geologic structure.' . . ."[2]

1. This should be compared with the Trial Court's statement here (*infra*, p. 117): ". . . To hold that Secretary Gardner approved the sale of the property without any provision for reserving the minerals would be to charge that official with having committed a fraud upon the United States . . ."

2. When this extract speaks of the "belated 'determination' " where it was stated "these are 'lands *believed to be* within the known geologic structure,' " this should be compared with the "belated" Geological Survey report here (*supra*, p. 21), after submission to the Secretary, that the oil and gas reservation "recommended" theretofore "is based upon the *possible presence* in the land of one or more salt domes . . ."

The above quoted extracts are applicable here, for the statute is clear, leaving no room for "speculation." The 1914 Act specifically limits its applicability to "Lands . . . which *are valuable for those deposits,*" and these words are "clear and unambiguous." The matter was submitted to the Secretary for *his determination,*[1] indeed the Muck memorandum specifically called the matter of a "mineral determination" to the Secretary's attention. The conclusion of the opinion below that Secretary Gardner approved a sale "so long as the valuable minerals were reserved . . . under the 1914 Act," — this, in the words of *Barash,* is pure "speculation." Even if this conclusion were justified (which is not the case), it would not meet the provisions of the Act. For the Secretary is bound to determine the lands are "valuable" *for a particular mineral deposit.* No mineral is named. There can be no determination of "value" as to a particular "mineral" *without naming* the mineral. Here no "mineral" is named, and where is there any determination by Secretary Gardner of "value"?

The foregoing discloses that the 1914 Act was not jurisdictionally applicable to these lands, and, the 1914 Act was not administratively applied to these lands. The fact that it was not administratively applied will become more manifest when considered in the context of the Taylor Act.

1. The 1914 Act contains a clause concerning "deposits on account of which the lands were withdrawn or classified or *reported as valuable,*" the meaning of the word "reported" is not clear. However, regardless of its meaning, the test is the same, i.e. "valuable" for "deposits," and a determination of *when* it is "reported as valuable" would still be required. Whatever the significance of this clause, originally, since the intervention of the Taylor Act and the required "classification" thereunder, it is apparent that the Secretary is now required to make the necessary "determination" that the lands "are valuable for those deposits."

We do not deem it necessary to elaborate upon the subsidiary question that, as a matter of law, the evidence submitted to Secretary Gardner would not have justified a determination that the lands were "valuable" for deposits of the five disputed minerals. For we feel that the action of the Director in executing the final certificate without affixing the mandatorily required marginal notation in accordance with 43 C.F.R. § 102.28, is conclusive. However, some comment is required as respects such evidence, because of some of the conclusions contained in the opinion below.

We earlier (*supra*, p. 13) noted the evidence detailed by the opinion below which was submitted to Secretary Gardner as relating to the mineral character of the land. The two Geological Survey reports were *identical* in all respects, prepared in Washington, D. C., and made *the day after* the request for a report. They did not *directly* answer the question as to whether the lands were "valuable for any mineral deposits," but stated *only* that "*Available* information *indicates* that this land is *prospectively* valuable for oil and gas; that *it is without value for other minerals.*" The Field Examination report, based on a visit in October, 1946, stated "the *area* has a *prospective value* for oil and gas," and said that in the event of a sale of the land "*in the absence of convincing evidence to the contrary,*" deposits of "sulphur, potash, oil, gas or other liquid or gaseous hydrocarbon minerals" should be reserved from the disposition.

The two Geological Survey reports did not unqualifiedly say that these *particular lands* were "prospectively valuable" but *only* that "*Available*" information "*indicates*" such; however, they *unqualifiedly* stated the lands had *no value* as to other minerals. The Field Examination report did not say that

these *particular lands* were "prospectively valuable" for oil and gas, but *only* that the "area" was so "prospectively valuable." The Field Examination report recommending the reservation of minerals *other than oil and gas,* is flatly contradicted by the two Geological Survey reports, one of which was *in light of, and made after,* the Field Examination report. In addition, the recommendation in the Field Examination report as to the reservation of the various deposits in the event of a sale of the lands was specifically contingent upon the clause "in the absence of convincing evidence to the contrary."[1]

It will be seen from the foregoing that each of the three reports are entirely equivocal from the standpoint of whether or not *these particular lands were valuable* for the deposits to which they refer. While it was not before Secretary Gardner, nevertheless the later Geological Survey report (quoted *supra,* p. 21) simply illustrates and confirms not only the equivocal nature of the three reports but also it demonstrates the clearly speculative nature thereof, i.e. "the *possible presence* in the land of one or more salt domes."

Furthermore, all three reports speak in terms of "pros-

1. We earlier noted the fact that at the time the matter was submitted to Secretary Gardner, the evidence disclosed that as of January 7, 1947, there were no applications pending for a "give-away" federal lease on all or any part of these lands, and this despite the activities in the area as noted by the report of the Field Examination. In *Diamond Coal Co. v. U. S.,* 233 U. S. 236, at p. 248, this Court said: ". . . Without any doubt these considerations induced the company to believe, and rightly so, that the lands in controversy possessed a value for coal mining greatly in excess of their value for any other purpose. *This explains the expenditure and the persistency of the company's efforts to acquire them;* . . . In short, the company, without care as to the means, sought and acquired the lands because it regarded them as valuable for coal . . ." The converse of this holding is applicable here.

pectively valuable." The term "prospectively valuable" in Land Office parlance, means "valuable for *prospecting*" and when its use in the above reports is given this connotation, it is obvious the above reports do not meet the statutory test of "mineral value." However, the opinion *Act of March 8, 1922*, 65 I.D. 39, contains this statement, p. 42:

> ". . . The Department has held also that a report by the Geological Survey that *homesteaded lands are 'prospectively valuable' (valuable for prospecting)* for a leasable mineral impresses the lands *with a prima facie mineral character sufficient to require the entryman to consent to a reservation of the mineral to the United States under the 1914 act or to assume the burden of proving that the lands in fact are nonmineral in character* . . ."[1]

Aside from giving the Land Office connotation of the term "prospectively valuable," as being "valuable for prospecting," the foregoing extract demonstrates that under early Land Office practice, even where the Geological Survey *unqualifiedly* (*not* "available information indicates") reported that the *particular* land (not the "area") was "prospectively valuable" for a mineral, nevertheless it *was not* competent evidence to meet the required statutory test for *a determination that lands were valuable for minerals*. On the contrary, it states that such a report was *only* a showing of "*prima facie*" mineral character, and by *prima facie* was meant that it was only sufficient to (1) require the entryman to consent to a reservation

1. In support of this statement, the Land Department cited a decision appearing at 50 L.D. 276 (1924), and one appearing at 50 L.D. 288 (1924).

under the 1914 Act, *or* (2) to assume the burden of proving that the lands in fact were not mineral in character.[1]

It is apparent from the nature of the evidence submitted to Secretary Gardner that, as a matter of law, it could not have served as the basis for making the required determination under the 1914 Act.

VI. The Question Of Whether, Under Section 7 Of The Taylor Act, These Lands Were "Classified" And "Opened For Disposal" Under The 1914 Act

As stated at the outset hereof, Section 7 of the Taylor Act is now the controlling statute for the entire system of federal public land disposal. Its importance cannot be overemphasized, yet if the decision below is allowed to stand, it will be the controlling appellate interpretation of the statute, particularly from the standpoint of the administrative application thereof.

When Pottharst filed his application to purchase these lands, he filed in conjunction therewith a petition for classification, since under the 1914 Act it was necessary for the Secretary to determine whether the land was "mineral," or "non-mineral." His petition *did not* mention a classification under the Taylor Act, for as noted in the opinion below (*infra*, p. 170), the petition simply "requested that the lands be classified as required by law . . ." Thus the statement by the Director, in his memorandum to the Secretary (*supra*, p. 16), that Pott-

1. Geological Survey reports are now governed by regulations issued pursuant to the 1914 Act, *cf.* 43 C. F. R. § 102.25 (*infra*, p. 152). It is apparent that the two reports involved here do not meet the requirements of that regulation from the standpoint of the substance of a report prescribed thereby. Also, it will be noted, where the report does comply with the regulation, still it is only *prima facie*.

harst had "filed a petition under Section 7 of the Taylor Grazing Act, as amended, for the classification . . . of (the land)," was a mere conclusion on the part of the Director. The position of petitioners throughout has been that these lands were never subject to the Taylor Act, while at the same time petitioners acknowledged that both the Director and the Secretary obviously considered the Taylor Act to be applicable and clearly they purported to proceed under that Act. It was the further position of petitioners that their error in this respect was immaterial, because in the final analysis the Secretary *only* classified the land for disposal under the 1884 Act, and, the Director issued the final certificate in accordance therewith. Since it was obvious that the matter was processed under the Taylor Act, it necessarily follows that the Secretary's actions contemplated the provisions of the Taylor Act and the appropriate regulations issued thereunder. Hence in determining the administrative decision so reached by the Secretary, such must be done in light of the provisions of Section 7 and the regulations thereunder which the Secretary is presumed to have acted in accordance with.

The opinion below (*infra*, p. 123) makes the following ruling:

> ". . . The Potthast application was *processed and classified* under Section 7 of the Taylor Grazing Act and, *acting under its terms, the Secretary determined*, that the United States could make a private sale of these lands under the 1884 Act so long as the valuable minerals thereunder were reserved to the Government under the 1914 statute . . ."

Petitioners agree with this ruling, *except* as to the last conclusion that the classification was conditioned upon "so long as

the valuable minerals thereunder were reserved to the Government under the 1914 statute . . ."

Under Section 7 of the Taylor Act, *only* the Secretary (here Secretary Gardner) had the authority to make the required "classification," and we earlier (*supra*, pp. 16, 17) quoted the two memoranda as to which Secretary Gardner acted and detailed his actions in connection therewith, and we submit that a consideration thereof, together with the plain meaning of the English language, simply will not warrant or justify the conclusion of the opinion below concerning the 1914 Act.

Our conclusion in this respect is further fortified by the action of the Director in issuing the certificate to Pottharst without affixing the mandatorily required marginal notation provided for by 43 C.F.R. § 102.28 (*infra*, p. 155) if it were issued under the 1914 Act. Further, when faced with this grossly improper interpretation of the two memoranda and Secretary Gardner's action in connection therewith, petitioners have been forced to the position of demonstrating the many and numerous reasons as to why the 1914 Act would not have applied to these lands and, thus, why it would be improper to hold that the Secretary did apply the 1914 Act. Such has been the purpose of the preceding portion of this petition.

It is the purpose here to demonstrate that a proper interpretation of Section 7 of the Taylor Act, and, a proper interpretation of what the Act requires of the Secretary in the application of the Act, make it impossible to reach the conclusion that the "classification" and "opening for disposal" here, contemplated the 1914 Act.

A consideration of Section 7 (*infra*, p. 144), must be had in the context of certain general propositions, to-wit:

(1) As the Act provides, it is *only* the Secretary, or, one with his delegated authority who is *authorized* to "classify" and "open" for disposal "under applicable" law;

(2) The regulations, 43 C.F.R. § 296.13 (*infra*, p. 156), provided that a classification "*will remain effective* unless revoked," hence it could not be modified or altered except by the Secretary;

(3) Accordingly, while neither the 1881 Act, nor, the 1914 Act provided any qualifications for an applicant, to the extent 43 C.F.R. § 296.7 (*infra*, p. 155) permitted the Land Office to take post-classification action in connection with the disposition to Potthast, it could only *refuse* to allow a disposition under the "classification of the land as subject to disposal under the public land law(s)" as designated by the Secretary, but it could not change or alter the classification and designated statute, or, allow a disposition other than in accordance therewith.

In addition to the foregoing we demonstrated (*supra*, p. 68, et seq.) how, as a result of the two Executive Orders of withdrawal, including Order No. 6964, and, Section 7, all "public lands" were "withdrawn" and thus *not subject to disposition* under *any* of the public-land laws. And that they so remained "withdrawn" until under Section 7 they were "classified" and "opened for disposal" under a particular statute, and, they could *only be disposed of under that particular statute.*

The last *proviso* of Section 7, provides that "upon the application of any qualified applicant . . . the Secretary . . . *shall* cause any tract to be classified . . . ." and the regulations,

43 C.F.R. § 296.4, make provision therefor, by providing: "The petition for classification and opening to entry, selection or location, must set forth all material matter whereby it may be determined whether the lands sought are more valuable or suitable for . . ." And when such a petition for classification is filed, Section 7 then provides as follows:

> The Secretary . . . is authorized:
>
> (a) "to examine and classify any lands withdrawn:
>
> (1) which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or
>
> (2) more valuable or suitable for any other use than provided for under (other sections of the Act), or
>
> (3) proper for acquisition in satisfaction of (three indicated statutes),
>
> and
>
> (b) to open such lands for entry . . . for disposal in accordance with such classification under applicable public land law(s)."

As respects Subparagraph (2) of the foregoing analysis of the Act and the phrase therein "any other use than provided for under" sections of the Act, *Hopkins v. U. S.*, 414 F. 2d 464, 472 (C.C.A., 9th, 1969), holds that this authorizes the Secretary to classify land for disposal under any appropriate disposal statute.

It will be seen from the foregoing analysis of Section 7 that in making the classification, the Secretary is bound to "examine" the land and make a finding that the land is more

valuable or suitable for a particular disposal, and, if he had made such a finding here as respects the 1914 Act, this would have required a finding on his part as to the character of the land, that it was more valuable for the five disputed mineral deposits. In addition, he was not only required to examine the character of the land in order to find it "more valuable or suitable," for disposal under the 1914 Act, but *at the same time and in order to classify it under the 1914 Act, he was required to determine* that the character of the land was such that it could be disposed of under the 1914 Act. And this is not only with reference to the mineral character but also with reference to the "agricultural" character of the land, since the 1914 Act only applied to "agricultural" lands as demonstrated above.

In *David B. Morgan*, 60 I.D. 266 (1948), where consideration was being given to an application to acquire under the Soldiers' Additional Homestead Act, it was held at p. 271:

> "However, section 7 of the Taylor Act, as amended, authorizes the Secretary of the Interior, in his discretion, to lift the reservation under which the tract sought in the present case is presently held, to restore the land to the public domain, and to open it to entry, selection, or location, if the tract can be classified as valuable, suitable, or proper for a particular type of disposal authorized by the public-land laws. To determine whether the type of disposal sought here on the basis of soldiers' additional homestead rights *is proper, it must be ascertained whether the land meets the requirements of the legislation creating the rights* . . .
>
> "The *findings* of the Acting Director of the Bureau of Land Management, which are supported by the data in the record, show not only that the land involved in this proceeding *is unsuitable for agricultural uses* and,

> therefore, *is not subject to classification for disposal in satisfaction of* soldiers' additional homestead rights, . . ."[1]

To the same effect is the Land Department decision in *George L. Ramsey, by Ted E. Collins*, 58 I.D. 272 (on rehearing), where the department held, p. 298:

> "This argument gives no weight to the fact that in his administration of the public lands *the Secretary*, although having wide power to do justice in his supervisory capacity, *is nevertheless bound by the terms* of the applicable statutes and may not substitute for their conditions rules of his own choosing in the circumstances of a particular case. Here *the conditions to be met by him in determining whether the selection may be approved* are laid down, as above stated, in section 7 of the Taylor Grazing Act as amended and in the forest lieu laws; and they concern nothing *but the status and character of the lands to be selected* and the propriety of the proposed use in its relation to the purposes of the withdrawal . . ."

The foregoing discloses the determination and findings which Secretary Gardner was bound to make in order to classify these lands under the 1914 Act. It is clear from the very terms of the statute, that in addition to the foregoing, in assigning the "classification" he would have been required to designate the 1914 Act *by name*, and a designation *by name* would have

1. In *Ferris F. Bootke*, 66 I.D. 395, in speaking of the determinations to be made, it is stated at p. 401: ". . . the Department must make *two determinations*. It must decide, first, whether the lands applied for *meet the criteria set by the statute providing for such a form of entry* and, next, whether the disposal of them would be compatible with the conservation purposes for which they were withdrawn. *Allison and Johnson, by Ted E. Collins*, 58 I.D. 227 (1942); 58 I.D. 235 (1943); *David B. Morgan, Assignee, supra; Nelson A. Gerttula; supra*, fn. 2; *George L. Ramsey, by Ted E. Collins*, 58 I.D. 272; 297 (1943)."

been required to "open such lands to entry . . . under applicable public-land law(s)."

That the Secretary is required to designate the statute by name, is manifest from the regulations, for 43 C.F.R. § 296.12 provides: "When public lands withdrawn by . . . E.O. 6964, Feb. 5, 1935, are classified as subject to disposition under some form of the public land laws and opened to such disposition in accordance with section 7 of the Taylor Grazing Act . . . , *the register will note said classification and the character thereof on his records.*" How would the register know the classification statute, if not designated by name? 43 C.F.R. § 296.7 (*infra*, p. 155) provides: "If the Secretary of the Interior approves the classification of the land as subject to disposal under the public land laws, the General Land Office will pass upon the qualifications of the applicant and determine whether he may be allowed to acquire title to the land under the application . . ." How would the Land Department know the statute to consult for the required qualifications of the applicant, if the statute was not designated by name?

The opinion below acknowledges that the "classification" here was had by the action of Secretary Gardner taken in connection with the Director's memorandum and (apparently) the Muck memorandum, yet in reaching the conclusion that the "classification" was also under the 1914 Act, it could not point to *where* there was mention of a single mineral deposit, much less a finding that the lands were "more valuable" for a single mineral deposit. Additionally, it was conceded that these lands were without agricultural value and hence they could not come under the 1914 Act. And since there was no mention of the 1914 Act, we submit it is not possible to hold

(1) the lands were "classified" for disposal under the 1914 Act, or (2) that Secretary Gardner "open(ed) such lands to entry . . . under" the 1914 Act.

This Court in *Mahler v. Eby*, 264 U. S. 32 (1923), in speaking of administrative action, quoted from an earlier decision as follows, p. 44:

> "'In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined *and show a substantial compliance therewith to give validity to its action.* When, therefore, such an administrative agency is required as a condition precedent to an order, *to make a finding of facts*, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective. * * *'"

While this decision was speaking with reference to a different situation than here involved, nevertheless in considering the statute here, particularly from the standpoint of the required administrative decision itself, we believe the quoted extract is applicable to the extent of requiring the decision to be made with particularity and perciseness. This conclusion is supported by what the Court said in *Barash v. Seaton, supra.*

We submit that when the action of Secretary Gardner as taken here, is tested in light of the requirements of Section 7 of the Taylor Act, and the administrative decisions required thereby, it is impossible to justify the conclusion reached by the opinion below, that these lands were "classified" for disposal under the 1914 Act. Yet the foregoing discloses that

such a "classification," and "opening" for disposal, was absolutely necessary before the 1914 Act could have had any application to the disposition to Pottharst. In the final analysis, the Director, as the highest officer in the Land Department, did not conclude that the 1914 Act governed the transaction, as reflected by his action in executing the final certificate.

There is one additional factor which militates against the conclusion of the opinion below that these lands were "classified" under the 1914 Act, and that is the requirement of 43 C.F.R. § 296.4 (*infra*, p. 157). This regulation specifically provides that if any land is "classified or is valuable for deposits" of the mineral deposits designated in the 1914 Act, then the petition for classification must make a showing as to certain matters, among which is the proposed use of the land without obtaining title; and, whether the applicant could obtain other land that would serve the desired purpose. Thus if Secretary Gardner had classified these lands under the 1914 Act as valuable for the disputed mineral deposits, then prior to opening the lands for disposal this regulation would have required that Pottharst amend his petition for classification in order to make the required showing. The proceedings do not show that any such requirement or action was taken.

VII. The Question Of The So-Called "Doctrine Of Acquiescence" Precluding Petitioners From Questioning The Mineral Reservation In The Patent

The question considered here is related to the matters discussed above (*supra*, p. 60, et. seq.) in connection with Section IV. There we cited the decision in *Simmons v. Wagner*, 101 U. S. 260, where this Court said, p. 261:

> "Where the right to a patent has once become vested in a purchaser of public lands, *it is equivalent*, so far as the Government is concerned, *to a patent actually issued.* The execution and delivery of the patent after the right to it has become complete are the mere ministerial acts of the officers *charged with that duty. Barney v. Dolph*, 97 U. S. 652."[1]

This extract holds that as between Pottharst and the Government, the final certificate issued to Pottharst "is equivalent . . . to a patent *actually issued*," and that the "execution and delivery of the patent . . . are the mere ministerial acts of the officers *charged with that duty*." Here the facts disclose that:

(1) The insertion of the mineral reservation in the patent, was a *clerical error* in the performance of the *ministerial function* of issuing the patent, and

(2) The patent was *executed* the day *before* its delivery, so that the inclusion of the erroneous mineral reservation was an accomplished fact when delivered to Pottharst.

Despite the foregoing, the opinion below holds that the title to the disputed minerals so acquired by Pottharst, was divested and reinvested in the U. S., through some so-called "doctrine of acquiescence," saying (*infra*, p. 127):

> "Also applicable in this case is the doctrine of acquiescence, *which has also been termed laches or administrative estoppel.* This principle has been established both by the courts and by numerous Interior Department rulings for the purpose of insuring an orderly administration of the public land laws of the United States by its executive officers."

[1] This extract from *Simmons* was quoted and followed in *U. S. v. Detroit Lbr. Co.*, 200 U. S. 321, 335; and, *Ballinger v. Frost*, 216 U. S. 240, 250.

When this extract speaks of "orderly administration of the public-land laws . . . by its executive officers," what was "orderly" about the clerical error in the patent? If a title so acquired may be divested by so-called "acquiescence," we are unable to perceive of a more extreme example thereof, than in the case of *Burke v. So. Pac. Co., supra*, yet this Court there (p. 200) held that the acceptance of a patent with a "mineral-land exception therein" to the patentee, and his *express agreement* that the mineral-land exception "should be effective as one of the terms of the patent," would not *bind or estop* the patentee, saying the patentee "has no voice in the matter" of patent terms and provisions, and "the land officers cannot enter into any agreement upon the subject."[1] Here *Burke* is entirely controlling, the patent conveyed the land and minerals to Potthast and the reservation was a nullity since it was unauthorized, just as was held in *Burke*. And being a nullity, there was nothing for Potthast to "acquiesce" in, for the agents of the Land Department derive their authority from the U. S., and not from Potthast.

Entirely applicable here, is the decision of the Supreme Court of Louisiana in *Blevins v. Manufacturers Record Pub. Co.*, 235 La. 708, 105 So. 2d 392, where the Court said, p. 712:

> "*The pleas of estoppel, ratification and acquiescence* are based upon the contention that plaintiff and his authors in title, *in various transactions subsequent to the acquisition* of December 13, 1940 consistently recited the ex-

[1] To the same effect is the Land Office decision in *Joseph E. McCloy et al.*, 50 LD. 623 (1924), where an applicant sought land and offered a mineral waiver under the 1914 Act, as to oil and gas, but in rejecting the application the Land Department held, p. 626: "The fact that the particular applicant *consents to a reservation* of the oil and gas *in his* patent would not *authorize* the insertion of such a reservation therein."

> ception of approximately 140 acres previously sold to Albert Plessis, and that these recitals *have the effect of a recognition of defendants' ownership in and to said acreage*. These pleas are equally unimpressive, *for one can never be divested of his title to property except in the manner prescribed by law*.- Pearce v. Ford, 124 La. 851; 50 So. 771; Long v. Chailan, 187 La. 507, 175 So. 52; Gibson v. Pickens, 187 La. 800, 175 So. 600; and Snelling v. Adair, supra."

The only modes of divestiture of title are by conventional contract, death and heirship, and forced alienation resulting from eminent domain, or, adverse possession.

As respects the other respondents who claim under the federal oil and gas lease, considering the certificate had issued to Potthurst, these lands were no longer subject to federal lease and for several reasons. *Simmons v. Wagner, supra*, says at p. 262:

> ". . . After the certificate issued the lands were no longer in law a part of the public domain, and *the authority* of the officers of the government to grant them *otherwise than to him*, or some person holding his rights, was gone . . ."

As demonstrated at the outset, these lands were never "public lands" and *Rawson v. U. S., supra*,- holds that the Mineral Leasing Act of 1920 only applied to "public lands." Had they been "public lands" the decision in *Bardon v. No. Pac. R. Co., supra*, holds that by a mere entry they would have ceased to be such and it necessarily follows that with the certificate issued to Potthurst, they could not have been "public lands." Finally, if they were withdrawn by Executive Order 6964 they ceased to be "public lands" and Secretary Gardner did not classify

them for disposal under the 1914 Act. It is apparent that the federal lease was a nullity.[1] Despite this, the opinion below (*infra*, p. 128) cites the Land Department decision in *Conrad Luft*, 63 I.D. 10 (1956), where the so-called "doctrine of acquiescence" was applied because of the passage of 21 years time and the intervening granting of a federal oil and gas lease. In a similar but more extreme situation, the Government asserted the same proposition as a bar to the reinstatement of certain mining claims, in *Udall v. Oil Shale Corporation*, 406 F. 2d 759 (1969),[2] and in rejecting this contention, despite the passage of some 30-35 years in time, the court said, at p. 765:

> "The land status in the area concerned *has become somewhat complicated* in that surface entries were received and processed; the Taylor Grazing Act has been administered in the same area as these and other claims of similar status; *oil and gas leases have been issued; and other entries have been processed by the Department*. The Secretary advances this problem as an argument to support its refusal to patent. . . . *This inipired land status is not the doing of the mining claimants*, as the Department *has proceeded to receive these other entries and to process them regardless of the unpatented claims. It is not a question of laches on either side* . . ."

The opinion below is in direct conflict with *Udall*.

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1. In *Alidore Mahler et al.* 61 I.D. 77 (1952), where a final certificate had issued in 1859 but was illegally ordered cancelled by the Commissioner, the Land Department held the certificate to be valid and an intervening federal lease to be without authority, saying p. 81: ". . . At the time when the lease was issued, the equitable title . . . was in the appellants . . . Lands to which the United States holds only the bare legal title are not subject to leasing under the Mineral Leasing Act . . . * * * . . . the outstanding oil and gas lease must be held to have been issued without lawful authority and to be subject to cancellation."

2. This decision was reversed and remanded on other grounds, *Hickel v. Oil Shale Corporation*, 400 U. S. 48 (1970).

In addition to the foregoing, those matters which the opinion below utilizes as the predicate for the application of the so-called doctrine, simply are not available for that purpose, as just demonstrated above with reference to the federal oil and gas lease. The so-called "mineral waiver" (*supra*, p. 7) was executed by Pottharst on March 10, 1947, *after* Secretary Gardner had classified the land for sale under the 1884 Act, but *prior* to the issuance of the final certificate and or patent. It said Pottharst consented "to an amendment of (his) said application," yet the application no longer existed, for the Secretary had accepted his offer, the application had ripened into a contract. The waiver was "pursuant to the provisions" of the 1914 Act, but this Act *did not* apply to these lands; and, Secretary Gardner did not classify the lands as subject to the 1914 Act. *Only the Secretary* could determine the lands were "valuable" for minerals and apply the 1914 Act. Pottharst could not make such a determination for this was the Secretary's function, and Pottharst could not by the waiver "classify" the lands nor make the lands "agricultural." The waiver was preliminary and subordinate to the final certificate. It was before the Director at the time he executed the final certificate and he did not attach any significance or efficacy thereto.[1] Since its effectiveness, if any, was rejected by the Director, and, it did *not prevent* the final certificate from vest-

1. In the Land Office decision of *Henry G. Hamm* (1931), 53 L.D. 311, the applicant had been required to consent to an amendment to his application to make it "subject to the provisions and reservations of the Act of July 17, 1914 (38 Stat. 509) as to oil and gas." Later the land was "classified as nonoil and nongas," and the ruling was that the stamped notation on the face of the application concerning the 1914 Act "should be canceled, and the Register advised that the consent to the reservation of the oil and gas . . . has been rejected."

ing Potthurst with title to the land and minerals, it could not *thereafter* serve to negate the final certificate.

The clause in the deed from Potthurst to Delta [quoted, *supra*, p. 8, subpar. (3)], concerning the mineral reservation, cannot be utilized in support of the so-called "acquiescence doctrine," for this Court has held the legal effect of recitals in a deed is *confined solely* to the parties to the deed and their privies — third persons or strangers to the instrument *derive nothing therefrom*. *Branson v. Wirth*, (1972) 411 U. S. 32, 39. To the same effect is *McDonald v. Richard*, 203 La. 155, 172-173, 13 So. 2d 742 (1943). These decisions demonstrate conclusively that respondents, as strangers to the Potthurst-Delta deed, derive no rights therefrom, nor can they point to the clauses contained therein, as operating as an estoppel against petitioners. Additionally, the clause is a "subject to" clause, and *U. S. v. McKenzie County, North Dakota*, 187 F. Supp. 170, 175 (D.C. 1960),[1] holds that a "subject to" provision is to protect the vendor *as to his warranty*. That it neither acknowledges or recognizes anything, for if, as a matter of law, there is no such outstanding encumbrance then a "subject to" clause does not and cannot create an encumbrance, particularly one vested in a third party and stranger to the deed.[2]

Since respondents derived no rights from the clause in the deed, it follows that none were derived from the ex parte

1. Affirmed *Murray v. U. S.*, 291 F. 2d 161 (1961, C.C.A., 8th).

2. The case of *Saunders v. Busch-Evagett Co.*, 138 La. 1049; 71 So. 153 (1916), involved a deed containing a "subject to" provision and in connection with which the Court said, p. 1054: "Moreover, nothing is more fundamental in the law of estoppel than that strangers to a deed cannot avail themselves of an estoppel arising from it. 16 Cyc. 710."

succession proceedings of the deceased John E. Pottharst. As to the mere "passage of time," considering the final certificate vested Pottharst with equitable title to the land and minerals, in *Simmons v. Wagner, supra*, the final certificate was dated July 8, 1829, and it was asserted and maintained *as a valid defense* against a subsequently issued patent dated April 25, 1871, and in the *Burke* case, *supra*, the time interval was sixteen years.

As above demonstrated, the granting of the federal lease on the lands was without authority in law, and a nullity. Pottharst was not responsible for the illegal granting of the lease. As to the statement by the opinion below (*infra*, p. 127) that the lessees, Getty and Gulf, "have *now* expended nearly $2.5 million in the mineral development of the property," there was no trespass upon or drilling upon that part of the property owned by the Pottharsts. With the initial trespass upon Delta's part of the property, the "spudding" of the No. 1 Well on June 26, 1958, Delta's protest letter (*infra*, p. 115, fn. 7) was dated September 5, 1958, *less than three months after such trespass*, and it placed Getty and Gulf upon "notice" of Delta's ownership of the mineral rights, and advised they were trespassing. And at that time the lessees had only expended $431,132.11 *for all charges* attributable to the federal lease and *not confined* to "development of the property."

Finally, the opinion below (*infra*, p. 127) says that: "No action has ever been taken (by petitioners) . . . to challenge the mineral reservation in proceedings before the Secretary of the Interior; and except for the 1966 State court suit, no judicial action was attempted . . ." Considering the pronouncements by this Court as above quoted, particularly *Sim-*

mons v. Wagner, supra, where was there any requirement or obligation imposed upon petitioners to take any action? The final certificate acknowledged Pottharst had purchased the property *and paid therefor*, and considering *Simmons*, what obligated or required him to then incur additional expense in vindicating the title he had paid for in full? Why could he not rest upon his rights so acquired and assert the final certificate by way of defense as done here, and, as done in *Simmons*, *Burke*, and *Cornelius v. Kessel*, all *supra*?

As respects "proceedings before the Secretary of the Interior" to "challenge the mineral reservation," here the patent had issued and in *West v. Standard Oil Co.*, 278 U. S. 200, this Court said, at p. 211: "The issuance of the patent terminated the jurisdiction of the department over the land." And in *McCormick Machine Co. v. Aultman*, 169 U. S. 606, this Court said, p. 609:

> "The only authority competent to set a patent aside, or to annul it, *or to correct it for any reason whatever*, is vested in the courts of the United States, and not in the department which issued the patent . . ."

Similarly, in *Steel v. Smelting Co.*, 106 U. S. 447, the Court said at p. 451:

> "It (the patent) cannot be *vacated or limited* by the officers (of the Land Department) themselves; their *power over the land is ended when the patent is issued* and placed on the records of the department. *This can be accomplished only by regular judicial proceedings* . . ."

These decisions demonstrate that there was no obligation or duty imposed upon Pottharst or petitioners to return to the Land Department.

With the exception of such knowledge as the Government had as respects the so-called "mineral-waiver," it was not pretended below that any of the respondents had knowledge of any of the above discussed matters when they pretended to acquire their claims and such knowledge as they acquired was after the filing in 1966 of the State Court suit (*infra*, p. 115) by Delta against Getty. The foregoing discloses that the items which the opinion below would utilize as a predicate for its application of the doctrine of "acquiescence," simply are not available as a matter of law, for that purpose.

In addition to the Land Department decision in *Conrad Luft, supra*, the only other authority cited by the opinion below in support of its application of the doctrine of "acquiescence" was (*infra*, p. 127) *Brennan v. Udall*, 379 F. 2d 803 (1967), cert. den. 389 U. S. 975; the opinion noting that the doctrine of acquiescence was applied there against a claim that a mineral reservation should not have been inserted in a patent, since the entry for the land had been made prior to the passage of the 1914 Act.[1] But there are so many distinctions between *Brennan* and this case, that it is impossible to hold *Brennan* applicable here.

The most important distinction of *Brennan* is the fact that in *Brennan* the original claimant *clearly benefited* from the claimed error of the Land Department, while fifty years later it was this claimed error which was being complained of.

1. The District Court, in *Brennan*, 251 F. Supp. 12, 18, et seq., held as a matter of law, that the 1914 Act did apply to prior, but unperfected, entries, giving plaintiff's contention as: ". . . . plaintiff relies for the most part on the (1914) act's legislative history. From this it is contended that the intent of Congress was to not allow classification of lands which had been entered prior to enactment or prior to classification . . .".

Thus the original entry in *Brennan*, was pursuant to the Homestead Act, and *prior* to the issuance of the final certificate and vesting of any rights, the land was clearly and definitely determined to be valuable for minerals[1] and to the claimant's knowledge. Under these circumstances *no part* of the land could have been acquired under the Homestead Act, whereas the entry was allowed for *the surface of the land* under the 1914 Act. Other distinctions of *Brennan* are:

(1) In *Brennan* the final certificate had the marginal notation thereon, required by 43 C.F.R. § 102.28 (*infra*, p. 155), clearly showing that the vested rights evidenced by the certificate *did not* include the disputed minerals; such is not the case here for the Pottharst final certificate included the disputed minerals;

(2) In *Brennan* the *claimed* error of the Land Department was in the administrative processing of the application, which to the knowledge of the applicant *at the time* occurred *prior* to the final certificate and vesting of rights. Here, *after* the final certificate and vesting of rights in Pottharst, there was a clerical error in the ministerial function of *preparing* the patent for execution, and Pottharst only acquired knowledge of the error *after* the issuance of the patent;

(3) The matters in *Brennan* occurred long prior to the intervention of the Taylor Grazing Act, and the error complained of was an erroneous statutory interpretation of the 1914 Act, whereas here the matter was processed under the Taylor Act and the assertion here is that the 1914 Act was not *jurisdictionally* applicable, and, the Secretary did not "classify" the lands under the 1914 Act, hence it *was not* administratively applied;

1. The clear and precise administrative mineral determination was quoted by the District Court at 251 F. Supp. 12, 15, fn. 2.

(4) In *Brennan*, prior to the execution and filing of the "mineral waiver" and to the claimant's knowledge: (a) the Land Office had determined the lands were valuable for minerals, (b) the Land Office held the 1914 Act applicable; and, (c) the Land Office *required* the execution of the mineral waiver. Here, none of these factors are present; and

(5) In *Brennan over* fifty years transpired before suit, whereas here the patent was delivered in April, 1947, the federal lease granted in April, 1954, there was *no trespass or intrusion* upon the Pottharst property, but in September, 1958, within three months of trespass upon Delta's property by the federal lessee, Delta advised the lessee of Delta's ownership of the minerals, and, *that the lessee was trespassing.*

We submit there was no basis for applying *Brennan* here, and no basis for applying the so-called "doctrine of acquiescence."

Subsidiarily, the opinion below (*infra*, p. 129) *indicates* that estoppel *might* operate in favor of the U. S., Getty and Gulf, but the evidence below shows that Getty and Gulf *actually examined* the records of the Land Office prior to acquiring *any rights.* In *Standard Oil Co. of California v. U. S.*, 107 F. 2d 402 (C.C.A., 9th, 1940), cert. den. 309 U. S. 654, 673, 697, in giving the requirements for invoking estoppel, the Court said, p. 416:

> "... The Standard *must show* not only that it was itself without knowledge of the true condition of the title *but that it had no convenient and available means* of acquiring such knowledge. (citing cases) ..."

Clearly the U. S., Getty and Gulf are charged with knowledge of the Land Office records and their disclosure of the disposition to Pottharst.

Wherefore, petitioners pray that this petition be granted and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, and that upon review the judgment below be reversed and set aside, and, it be decreed in favor of petitioners that John E. Pottharst acquired the disputed mineral rights in 1947 and same are now held by petitioners free of any claim by respondents.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, H. M. Holder, attorney for petitioners in the foregoing petition, and a member of the Bar of this Court, hereby certify on behalf of petitioners in the foregoing petition that all parties required to be served with a copy of this petition have been duly served by mailing three copies of the petition to counsel of record representing them as follows, to-wit: Getty Oil Company, through its attorney of record, Austin W. Lewis, Liskow & Lewis, Twenty-Second Floor, 225 Baronne Street, New Orleans, Louisiana 70112; Gulf Oil Corporation, through its attorney of record, John E. Bailey, Gulf Oil Company-U. S., Post Office Box 61590, New Orleans, Louisiana 70160; The Louisiana Land and Exploration Company, through its attorney of record, J. B. Miller, Milling, Saal, Saunders, Benson & Woodward, 1122 Whitney Building, New Orleans, Louisiana 70130; and by mailing three copies to Thomas Connell, in proper person, 538 Whitney Building, New Orleans, Louisiana 70130; all of the above having been mailed first class, postage prepaid, addressed, respectively, to counsel and/or proper person at the post office addresses above set forth, they residing within 500 miles of the undersigned, and by serving three copies thereof upon the United States by mailing same to the Solicitor General, Department of Justice, Washington, D. C. 20530, in an envelope so addressed, by air mail, postage prepaid, all of the foregoing having been deposited in the United States mail at Shreveport, Louisiana, on the _____ day of _____, 197_.

_____

Of Counsel

APPENDIX

OPINION OF COURT OF APPEALS

447 F. 2d 989

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-1913

Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DELTA DEVELOPMENT COMPANY, INC.,
JOHN E. POTTHARST, JR., ind., Etc., ET AL,
Defendants-Appellants,

and

GETTY OIL COMPANY, GULF OIL CORPORATION,
THOMAS CONNELL and THE LOUISIANA LAND
AND EXPLORATION COMPANY,
Additional Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

(September 16, 1971)

Before THORNBERRY, MORGAN, and CLARK,
Circuit Judges.

PER CURIAM: We are in agreement with the cogent opinion of the district court, *United States v. Delta Development Company*, 322 F. Supp. 121 (E.D. La. 1970). The judgment appealed from is

AFFIRMED.

*Rule 18, 5 Cir.; See *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al.*, 5 Cir. 1970, 431 F. 2d 409.

JUDGMENT OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1970

No. 71-1913

Summary Calendar

D. C. Docket No. 69-74

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DELTA DEVELOPMENT COMPANY, INC., JOHN E. POTTHARST, JR., ind., Etc., ET AL,
Defendants-Appellants,

and

GETTY OIL COMPANY, GULF OIL CORPORATION, THOMAS CONNELL and THE LOUISIANA LAND AND EXPLORATION COMPANY,
Additional Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was taken under submission by the

Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered defendants-appellants pay to plaintiff-appellee and additional defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

September 16, 1971

Issued As Mandate: OCT. 18, 1971

COURT OF APPEALS ORDER ON REHEARING

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1913
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DELTA DEVELOPMENT COMPANY, INC., JOHN E. POTTHARST, JR., ind., Etc., ET AL,
Defendants-Appellants,

and

GETTY OIL COMPANY, GULF OIL CORPORATION, THOMAS CONNELL and THE LOUISIANA LAND AND EXPLORATION COMPANY,
Additional Defendants-Appellees.

Appeal from United States District Court for the Eastern District of Louisiana

(October 8, 1971)

ON PETITION FOR REHEARING

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

DISTRICT COURT OPINION
(322 F. Supp. 121)

UNITED STATES of America,
Plaintiff,
v.
DELTA DEVELOPMENT COMPANY, Inc., Mildred Heintz Pottharst, John E. Pottharst, Jr., Mildred Pottharst Ellis, Viola Pottharst Rowland, Getty Oil Company, Gulf Oil Corporation, Thomas Connell and Louisiana Land and Exploration Company, Defendants.

Civ. A. No. 69-74.

UNITED STATES DISTRICT COURT
E. D. LOUISIANA,
NEW ORLEANS DIVISION.

Nov. 16, 1970.

CASSIBRY, District Judge:

This is an action by the United States to quiet its title to the mineral rights in 1921.62 acres of land in Plaquemines Parish, Louisiana.[1] The property is located in the Bastian Bay gas field and is quite valuable for minerals.

The suit involves a determination of the validity of a mineral reservation in favor of the United States that was

1. The United States initially sought injunctive relief against a state court action in the District Court of Plaquemines Parish which sought the cancellation of the federal mineral lease held by Getty and Gulf. The court has been advised by the parties, however, that by agreement no further action will be taken in the state suit pending the outcome of this litigation.

incorporated in a 1947 land patent granted by the Government to John E. Pottharst. The principal defendants are the heirs of Pottharst and Delta Development Company, Inc., the transferee of Pottharst as to a portion of the property. Named as additional defendants were Getty Oil Company (the successor by merger of Tidewater Oil Company) and Gulf Oil Corporation, the mineral lessees of the property, holding under a mineral lease granted by the United States pursuant to the provisions of the Mineral Leasing Act of February 25, 1920 (30 U.S.C. § 181, et seq.). Also named were The Louisiana Land & Exploration Company and Thomas Connell, the owners of overriding royalty rights under that federal lease.

The mineral lessees, Getty and Gulf, actively joined the United States by adopting in their answers all of the allegations of the Government's complaint. The two companies then proceeded by cross-claim against the Delta-Pottharst Group and asserted certain special pleas and contentions. These included the assertion of the doctrine of acquiescence, a plea of estoppel, a claim that any attack on the patent granted by the United States is a prohibited collateral attack on that document and, finally, the assertion of their position as bona fide third parties who had purchased on the faith of the public records of Plaquemines Parish.

The matter was originally put at issue by motion and cross-motion for summary judgment, but all of the parties later executed and filed a stipulation which submitted the matter on the merits as to all issues. While the record is voluminous, the facts are entirely undisputed although questions were raised concerning the relevancy and admissibility of certain documents.

THE STATUTORY SCHEME

The land in question originally comprised a portion of a military reservation, having been set aside for military purposes by an 1844 Executive Order. On September 3, 1886, the reservation was abandoned. This was accomplished by a revocation of the original withdrawal order by a second Presidential order of that date. This second order turned the property over to the Secretary of the Interior for disposition under the Act of July 5, 1884.[2]

It may make for clarity to consider at this point not only the 1884 statute but all other pertinent Congressional acts in force when this land was patented to Pottharst in 1947.

The Act of July 5, 1884 dealt specifically with the conveyance by the Secretary of the Interior of abandoned military reservation lands. It is important to note that the statute did not purport to be a Congressional or *in praesenti* grant, but rather it vested in the Secretary the discretionary authority to dispose of the properties. The Act provided for the surveying and appraisal of the lands and for offering for sale at public auction. If this method of disposal was not successful, the Secretary was then authorized to convey the land by private sale. The property in question had twice been unsuccessfully offered for sale at public auction before Pottharst made his application to purchase it by private sale.

Section 5 of the 1884 Act is significant. It provided as follows:

"Sec. 5. Whenever any lands containing valuable mineral deposits shall be vacated by the reduction or

2. 23 Stat. 104; see also 43 U.S.C. § 1074.

abandonment of any military reservation under the provisions of this act, the same shall be disposed of exclusively under the mineral land laws of the United States."

In 1914 Congress adopted the Mineral Reservation Act of July 17, 1914.[3] This was the first major step taken by Congress after years of study to protect the valuable mineral resources of the United States. This 1914 statute authorized the sale under any applicable nonmineral land law of public domain lands "withdrawn or classified or reported as valuable * * *" for minerals, subject to the specific requirement and condition that the mineral rights therein be reserved to the United States.

As the final step in the consummation of its mineral policy, Congress enacted the Mineral Leasing Act of February 25, 1920.[4] This statute specified that mineral leasing of the lands and mineral rights of the United States was the exclusive method of disposing of such rights.

[1] Executive Order No. 6964, issued on February 5, 1935, withdrew from entry or sale all of the public domain lands located in specifically named states, including Louisiana. In the following year Congress amended the Taylor Grazing Act to insure the maximum utilization of the lands withdrawn under the 1935 Executive Order. To accomplish this, the amendment authorized the Secretary of the Interior, in his discretion, to classify any of these lands as being more valuable for agricultural purposes or "more valuable or suitable for any other use than the use provided for in this Act." It then author-

3. 30 U.S.C. § 121 et seq.
4. 30 U.S.C. § 181, et seq.

ized the Secretary to open the lands for entry and disposal "under applicable Public Land Laws."[5] It seems clear that any property that originally was subject to the Executive Order was fully restored to public lands status by this amendment and thereafter was available for disposal under any public land law.[6]

FACTS

This was the statutory scheme in existence when John E. Pottharst made application on July 17, 1946 to purchase these lands. He filed a "petition for classification" in which it was requested that the lands be classified as required by law and that he be permitted to acquire title thereto. He also filed a nonmineral affidavit which stated that to his knowledge the land had no mineral value.

On July 23, 1946 the Chief of the Indian Lands and Grazing Division, Bureau of Land Management, requested a report from the United States Geological Survey concerning whether the lands affected by the Pottharst application were valuable for any mineral deposits. The Geological Survey is the agency within the Interior Department charged with the responsibility of making the mineral determination of all public lands prior to their disposal.

One of the important issues in this case is whether these properties actually were found or reported to be valuable for

5. Taylor Grazing Act as amended June 26, 1936, 43 U.S.C. § 315, et seq.

6. This is important in view of defendants' contention (discussed *infra*) that these properties were not "public lands" of the United States and that they enjoyed a special status as abandoned military reservation lands.

minerals before John E. Pottharst acquired any vested rights in them. This justifies the following detailed account of the actions that were taken following the original request to the Geological Survey:

(1) On July 24, 1946, the Director of the Geological Survey replied to the Commissioner of the Bureau of Land Management that available information indicated that these lands were prospectively valuable for oil and gas and that said lands were without value for other minerals.

(2) On August 30, 1946, the Acting Director of the Bureau of Land Management directed a memorandum to the Supervisor of the Branch of Field Examination requesting that a report of field examination of the subject lands be made. Copies of the application, status sheets, Geological Survey report and Circular No. 1072 were enclosed with that request.

(3) On October 29, 1946, Field Examiner Benjamin F. L. Heron filed a three-page typewritten report based on an on-the-ground investigation of this property made by him on October 22, 1946, which report stated that the area had a prospective value for oil and gas and that these minerals, together with sulphur, potash or other liquid or gaseous hydrocarbon minerals, in absence of convincing evidence to the contrary, should be reserved from disposition.

(4) On January 7, 1947 the Chief of the Indian Lands

and Grazing Division directed a supplemental request for a report to the Director of Geological Survey requesting information as to whether the lands involved were valuable for any mineral deposits.

(5) On January 8, 1947, the Director of the Geological Survey replied to the Acting Director of the Bureau of Land Management that available information indicated that these lands were prospectively valuable for oil and gas and it was without value for other minerals.

On February 20, 1947, the Director of the Bureau of Land Management recommended that the lands in question be classified for sale under Section 7 of the Taylor Grazing Act and that the property be disposed of in accordance with the terms of the Act of July 5, 1884, or as otherwise provided by law.

On February 25, 1947, Lee Muck, Assistant to the Secretary in Charge of Land Utilization, in connection with the proposed classification, addressed a memorandum to the Secretary of the Interior stating:

"Subject: Mineral reservation in patent, BLM 011101.

"I have surnamed the attached memorandum recommending the sale of certain lands in Louisiana under the act of July 5, 1884, after having been given verbal assurance by the Bureau of Land Management that the patent issued on these lands will contain a reservation of minerals, under applicable law. It appears that reference to such a reservation was omitted from the memorandum inadvertently."

On February 28, 1947 Warner W. Gardner, in the performance of his duties as the Assistant Secretary of the Interior, approved the February 20, 1947 recommendation for the sale of these lands by signing the letter of recommendation. He wrote on the memorandum "See Muck memorandum of 2/25." The deposition of former Secretary Gardner was taken, and he testified that the handwritten notation formed a part of his official act. This action of Secretary Gardner in approving the recommendation constituted the classification of the land for sale.

On March 10, 1947, John E. Pottharst executed a document entitled "Mineral Waiver (Oil, Gas, Etc.) Consent to the placing of application under the Act of July 17, 1914 (38 Stat. 509)." In this instrument, Pottharst consented to the amendment of his application for the purchase "so as to reserve to the United States all the phosphate, nitrate, potash, oil, gas or asphaltic mineral deposits of the land embraced in said application, pursuant to the provisions, conditions, reservations, and limitations of the Act of July 17, 1914 (38 Stat. 509)."

On March 25, 1947, the Director of the Geological Survey wrote to the Director of the Bureau of Land Management noting the prior recommendations that oil and gas be reserved to the United States in the sale of said land, and concurred in the additional recommendation that sulphur and potash be reserved. It was also recommended that sodium be reserved.

On March 25, 1947, the Bureau of Land Management issued a "certificate" in favor of John E. Pottharst concerning the subject lands. The certificate appearing in BLM File No.

011101 as of October 29, 1969, had affixed thereto in the upper lefthand margin a combination rubber stamp and written notation to the effect that:

> "Application made in accordance with and subject to the provisions and reservations of the Act of July 17, 1914 (38 Stat. 509) as to oil, gas, sulphur, potash & sodium, as amended by the act of March 4, 1933 (47 Stat. 1570). * * *"

On April 22, 1947 Patent No. 1122086 was issued by the United States to John E. Pottharst describing the subject lands and containing the following clause:

> "Excepting and reserving, however, to the United States all the oil, gas, sulphur, potash and sodium, in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine and remove such deposits from the same upon compliance with the conditions and subject to the provisions and limitations of the Act of July 17, 1914 (38 Stat. 509) as amended by the Act of March 4, 1933 (47 Stat. 1570)."

Pottharst recorded this patent in the records of Plaquemines Parish on June 7, 1947.

On July 2, 1947, Pottharst conveyed a portion of the land to Delta Development Company, Inc. The deed to Delta contained the following provisions:

> "Being the same property acquired by VENDOR from the United States of America by recorded Patent No. 1122086, dated April 22, 1947, registered in Plaquemines Parish, COB 125, Fo. 503 on June 7, 1947.
>
> "This sale is made subject to the RESERVATION of all mineral rights reserved to the United States of America under said Patent issued to VENDOR."

On April 2, 1954 the existing federal lease (BLM Lease No. 036201) was granted to Thomas Connell. It was made effective as of May 1, 1954. Through subsequent assignments, title to this lease vested in Tidewater Oil Company (now Getty) and Gulf. These companies, through Tidewater as operator, commenced the drilling of the first well on the property under this federal lease on June 26, 1958.

On October 18, 1958, John E. Pottharst died in the City of New Orleans. His succession was opened in Orleans Parish. The portion of this property not sold to Delta was described and identified in both the Inventory and in the Judgment of Possession in the succession proceedings; and at the end of the description of the land in both of these succession documents are the following statements:

> "All minerals reserved to U. S. A.
>
> "Being the same property acquired by John E. Pottharst by Patent #1122086 from the U.S.A. on April 22, 1917, and duly registered in C.O.B. 125, Folio 503, on June 7, 1947."

Until the filing of their pleadings in the present suit, neither John E. Pottharst nor his heirs had taken any action to disavow the several acts listed above in which they recognized the ownership of the mineral rights in this land to be vested in the United States. Delta did not take any formal action in connection with this protest until April 22, 1966 when the still pending State action was instituted against Tidewater alone.[7] Further, neither John E. Pottharst nor the Delta-Pott-

7. Delta did write a letter of protest to Tidewater after that company had commenced the drilling of a well on the land, which was followed by discussions between the attorneys for both parties. However, Delta took no further action until the 1966 suit was filed. At that time, Delta was asserting a different legal theory than those advanced in this suit.

harst Group have ever taken any administrative action before the Secretary of the Interior to challenge the validity of the mineral reservation that was incorporated in the Pottharst patent.

On the date of the filing of the present suit, Getty and Gulf had expended slightly less than $2.5 million in connection with their drilling and producing operations under the federal lease. Substantial royalties have been paid to the United States and such royalties are still accruing.

THE DETERMINATION THAT THIS LAND WAS VALUABLE FOR MINERALS

The Delta-Pottharst Group assert that John E. Pottharst acquired title to this land, or at least vested rights in it, on February 28, 1947 when Assistant Secretary Gardner approved the classification of the land for sale. They contend that Pottharst had previously deposited with the Government the purchase price of the land and that the contract of sale became complete when it was classified for sale. Alternatively, they argue that the certificate of March 25, 1947 vested complete title in Pottharst and that a formal patent was not necessary since it was not specifically provided for in the 1884 Act. With respect to the question of whether the property was determined to be valuable for minerals, it is argued that the Muck memorandum which was referred to in the classification by Secretary Gardner should be disregarded since it was not included in the body of the classification; it is suggested that the court ignore the mineral waiver signed by John E. Pottharst in which he agreed that the mineral rights would be reserved by the United States under the 1914 statute; and finally it is

contended that the stamped notation on the certificate which referred specifically to the 1914 Act should be disregarded since it was the notation normally placed on the original application rather than the one customarily used for a certificate.

The court cannot accept these technical arguments of the defendants. It should first be said that the evidence is overwhelming that these lands were in fact determined to be valuable for minerals prior to the first date on which the defendants claim Pottharst acquired vested rights in the land, this being the classification for sale that was made on February 28, 1947. There has previously been recited the numerous steps that were taken to investigate the mineral possibilities, which included a field trip by representatives of the Interior Department and the three separate recommendations that the mineral rights be reserved to the United States in any sale of the land. To hold that Secretary Gardner approved the sale of the property without any provision for reserving the minerals would be to charge that official with having committed a fraud upon the United States. The pleadings make no such charge and, in any event, it would not be justified. The Secretary of the Interior had undoubtedly determined that these lands had mineral value so as to require the reservation of the mineral rights by the United States prior to the time that the land was classified for sale.

[2] Defendants also contend that even if the Secretary in fact made the mineral classification, he employed erroneous tests for that determination and that the evidence was insufficient to support it. Defendants are here challenging a factual determination made by the Secretary many years ago. Public land law dictates that any question of fact decided by the Sec-

retary is conclusive and is not open to relitigation in the courts. Burfenning v. Chicago, St. P., M. & O. Ry. Co. 163 U.S. 321, 16 S. Ct. 1018, 41 L. Ed. 175 (1896); DeCambra v. Rogers, 189 U.S. 119, 23 S. Ct. 519, 47 L. Ed. 734 (1903); St. Louis Smelting and Refining Co. v. Kemp, 104 U.S. 636, 26 L. Ed. 875 (1882).

In arguing against giving any legal effect to the mineral classification, defendants rely upon Burke v. Sou. Pacific R. R. Co., 234 U.S. 669, 34 S. Ct. 907, 58 L. Ed. 1527 (1914). Defendants urge that under *Burke*, the mineral reservation in the Pottharst patent must be ignored and regarded as not written. *Burke* is inapposite. It involved a direct statutory railroad grant in which the statute specifically excluded mineral lands (not mineral rights) from its effect. When the *Burke* patent was issued, the 1914 Act was not in existence and therefore the Secretary had the option of either conveying the lands with the minerals or, as to any lands known to have mineral value, to exclude them entirely from the sale. The *Burke* patent did not contain a specific mineral reservation but there was incorporated therein only a general clause providing that "excluding and excepting all mineral lands, should any be found, in the tracts aforesaid." The Court's decision was based on the assumption that the Interior Department had not made any investigation of the mineral character of the land and since they were included in the patent, it was forced to assume that they were nonmineral in character. In this case, the opposite is true; the Interior Department made several specific determinations of the mineral value of the Pottharst lands before Pottharst acquired his rights.

[3] The defendants contend that Pottharst acquired vested rights in this property by the mere classification of it for sale. On this point it must again be pointed out that this land was not conveyed under a statutory or *in praesenti* grant, but rather the sale was made under a permissive statute which gave the Secretary discretionary authority to sell or not sell. In this situation, the classification represented only the tentative decision of the Secretary to sell, and Pottharst as the applicant acquired no vested rights against the United States through the classification. Hutchings v. Low, 15 Wall. 77, 82 U.S. 77, 21 L. Ed. 82 (1873); Lewis v. Udall, 374 F. 2d 180 (9th Cir. 1967).

[4-6] While it may be unnecessary to consider the point, the same conclusion must be reached as to the alternative contention of the Delta-Pottharst Group that the certificate of March 25, 1947 conveyed complete title to Pottharst with the mineral rights. Factually, when this certificate was issued, the mineral determination had been made, Pottharst had signed the mineral waiver formally agreeing to the reservation of the minerals by the Government and, as previously noted, the certificate itself contained the stamped notation that the sale was made subject to the 1914 statute.[8] Whatever rights Pottharst may have acquired through the certificate clearly were subject to the provision for reservation of mineral rights by the United States from the formal sale. Here again, however,

8. Defendants argue that since this was the wrong stamp, it was not even admissible in evidence. The notation is one specifically provided for in the regulations of the Secretary and, necessarily, it is valid evidence. While it was not the one customarily placed on certificates, it unquestionably reflected the decision of the Secretary to reserve the minerals under the 1914 Act.

the court finds that Pottharst did not gain title to the land through the certificate and that this was accomplished only by the patent, which admittedly contained a formal reservation of the minerals in favor of the Government. Insofar as the statutes involved in this case are concerned, only the patent conveyed formal title from the United States to Pottharst. Carter v. Ruddy, 166 U.S. 493, 17 S. Ct. 640, 41 L. Ed. 1090 (1897); Wilcox v. Jackson ex dem. McConnel, 13 Pet. 498, 38 U.S. 498, 10 L. Ed. 264 (1839); Niles v. Cedar Point Club, 175 U.S. 300, 20 S. Ct. 124, 44 L. Ed. 171 (1899); St. Louis Smelting & Refining Co. v. Kemp, *supra*. In *Carter*, the rule was applied to a statute which, like the 1884 Act, did not specifically provide for a patent. In that case the Court said:

> "* * * While it is true that the act of 1854 does not in terms provide for the issue of a patent, and simply authorizes the location of the scrip upon any public lands, yet the general rule is that a patent is necessary for the transfer of the legal title to public lands.
>
> * * * * * *
>
> "* * * It is enough that there is nothing to exempt this case from the ordinary rule that a patent is necessary to convey the legal title; that the certificate of location created, at best, but an equitable title; and that such a title is not sufficient to sustain an action of ejectment in the federal courts." 166 U.S. at 495, 496, 17 S. Ct. at 641, 642.

If any question existed originally with respect to the need for a formal patent, it was settled by the 1914 Mineral Reservation Act. That statute specifically calls for the issuance

of a patent, subject to the mineral reservation in favor of the United States.[9]

The court therefore finds that on all pertinent dates the mineral determination had been made with respect to this property, and there remains only the question of determining whether the 1914 statute, requiring the reservation of the minerals in such cases, was applicable to the Pottharst sale.

THE 1884 STATUTE MUST BE CONSTRUED WITH THE 1914 MINERAL ACT IN CONSIDERING THE MINERAL RESERVATION CONTAINED IN THE POTTHARST PATENT

[7] The Delta-Pottharst Group contend that since these properties originally were part of a military reservation, they lost permanently their status as public lands of the United States and that therefore the 1914 mineral statute was inapplicable to the Pottharst sale. Defendants cite Wilcox v. Jackson, 13 Pet. 498, 38 U.S. 498, 10 L. Ed. 264 (1839) and United States v. O'Donnell, 303 U.S. 501, 58 S. Ct. 708, 82 L. Ed. 980 (1938) as authority for their position. These cases stand for the proposition that so long as lands reserved for some special purpose are still affected by the reservation, they are not subject to the general land laws of the United States. In this case, however, the military reservation was formally abandoned in 1886. When that abandonment occurred, the property again became part of the public lands of the United

9. Section 3 of the 1914 Act, 30 U.S.C. § 123, provides in part that "Any person who * * * shall locate, select, enter or purchase, after July 17, 1914, under the nonmineral land laws of the United States, any lands * * * [which are later reported or classified as being valuable for minerals] may * * * *receive a patent therefor, which patent shall contain a reservation to the United States* * * * [of all pertinent mineral deposits.]." (Emphasis added.)

States and was subject to disposition under any of the general land laws enacted after that date. Northern Lumber Co. v. O'Brien, 139 F. 614 (8th Cir. 1905); Bardon v. Northern Pacific R. Co., 145 U.S. 535, 12 S. Ct. 856, 36 L. Ed. 806 (1892); Frost v. Wenie, 157 U.S. 46, 15 S. Ct. 532, 39 L. Ed. 614 (1895); Anderson v. McKay, 94 U.S. App. 11, 211 F. 2d 798 (1954). One such law in effect when the Pottharst sale was made was of course the 1914 statute which required that once a mineral determination is made, the mineral rights must be reserved from any sale made by the United States.

[8, 9] Section 5 of the 1881 Act appears to be in harmony with the 1914 statute. Section 5 provides that any lands proven to be valuable for minerals must be disposed of "exclusively under the mineral land laws of the United States." The 1914 Act, clearly a "mineral land law" in turn provides:

> "Lands * * * valuable for those deposits, shall be subject to * * * purchase, if otherwise available, under the nonmineral land laws of the United States." (Such purchase to be subject of course to the mineral reservation by the United States.)

By the express terms of the two statutes, therefore, one being a nonmineral land law and the other a mineral land law, the Pottharst sale was properly made under the 1881 Act, subject to the mineral reservation requirement of the 1914 statute.[10]

10. Defendants' contention that the 1884 Act provided the exclusive method of selling abandoned military reservation lands and that the 1914 Act cannot be invoked must also be rejected. As previously noted, the 1884 Act was only a permissive one which could be used by the Secretary at his discretion. In this respect, the Act is different from the statutes construed in Oklahoma v. Texas, 258 U.S. 574, 42 S. Ct. 406, 66 L. Ed. 771 (1922); West v. Work, 56 App. D.C. 191, 11 F. 2d 828 (1926); and Clark v. Herington, 186 U. S. 206, 22 S. Ct. 872, 46 L. Ed. 1128 (1902), which clearly provided the exclusive method of selling the lands affected by them.

If any question existed concerning the interpretation of the two statutes, it was removed by Section 7 of the Taylor Grazing Act, as amended in 1936. This land had been withdrawn by Executive Order 6964, and the amendment of Section 7 of the Taylor Grazing Act authorized the Secretary to classify the land for sale "under applicable public land laws, * * *" The Pottharst application was processed and classified under Section 7 of the Taylor Grazing Act and, acting under its terms, the Secretary determined that the United States could make a private sale of these lands under the 1884 Act so long as the valuable minerals thereunder were reserved to the Government under the 1914 statute. This procedure was followed by the Secretary, and the sale to Pottharst with the mineral reservation was in accordance with the statutory directions of Congress.

The Delta-Pottharst Group assert that Section 5 of the 1884 Act (providing for the exclusive disposition of the property under the mineral land laws of the United States) referred only to the mineral land laws that were in existence when the statute was passed, i. e., the placer mining laws under which a claimant could have obtained complete fee title to land known to be valuable for minerals. The construction contended for by defendants is contrary to several decisions construing statutes that dealt with "minerals" or "mineral laws." Many courts have applied subsequent legislation in construing statutes of this kind. Northern Pacific R. R. Co. v. Sanders, 166 U.S. 620, 17 S. Ct. 671, 41 L. Ed. 1139 (1897); Northern Pacific R. R. Co. v. Soderberg, 188 U.S. 526, 23 S. Ct. 365, 47 L. Ed. 575 (1903) [and 104 F. 425 (9th Cir. 1900)]; Nelson v. Northern Pacific R. R. Co., 188 U.S. 108, 23 S. Ct. 302, 47 L. Ed. 406 (1903); West Coast Exploration Co. v. McKay,

93 U.S. App. D.C. 307, 213 F. 2d 582 (1954), cert. denied, 347 U.S. 989, 74 S. Ct. 850, 98 L. Ed. 1123 (1954); Anderson v. McKay, 94 U.S. App. D.C. 11, 211 F. 2d 798 (1954), cert. denied, 348 U.S. 836, 75 S. Ct. 51, 99 L. Ed. 660 (1954). Also, the argument of the defendants ignores the historical development of the concept that the United States should and must reserve its mineral wealth and administer these properties through a system of leasing rather than outright divestiture. As to petroleum resources, this policy culminated in the passage of the Mineral Reservation Act of July 17, 1914 and the Mineral Leasing Act of February 5, 1920.

This rule was enunciated in the *Anderson* case where the Court held that the 1914 statute under consideration here cut across the provisions of an earlier statute. This was said by the Court:

> "So in this case, so far as the 1914 Act is concerned, we think it sharply restricted all patent rights which had theretofore existed, but had not been exercised, in respect to lands reported to be valuable for certain mineral deposits.
>
> * * * * * * *
>
> "Even if the 1887 Act were held to eliminate the mineral land exclusion from patentability, the requirement for a patent still remained, and the Secretary had to pass upon the application. And in the meantime, in 1914, before any application was filed, Congress imposed a new restriction upon patents to mineral land. That, too, was a matter for the Secretary to pass upon." 211 F. 2d at 803, 807.

The court holds, therefore, that the 1914 Act required that the mineral rights be reserved from the Pottharst sale and that this reservation was validly made.

THE RULE OF CONSISTENT ADMINISTRATIVE CONSTRUCTION

[10] The court's holding that the Government validly reserved the mineral rights in this case is strengthened by the administrative construction that has been given by the Secretary of the Interior to the statutes relating to abandoned military reservation lands since 1914, or some 55 years prior to the filing of this suit.

The defendants' argument in this suit that the 1884 statute provided the exclusive method of disposing of abandoned military reservation properties is contrary to "Instructions" that were issued by the Secretary on January 2, 1914 which are reported in 43 L.D. 33. It was there ruled that such properties could be disposed of without meeting all of the requirements of the Act of July 5, 1884. Then on June 4, 1936, the Interior Department issued additional instructions which held that lands in abandoned military reservations were included in the withdrawal provided for in Executive Order 6964 and thereafter were subject to classification and disposition under the amended Taylor Grazing Act. This ruling clearly subjected these lands to all public land laws of the United States, including specifically the 1914 Mineral Reservation Act. These instructions were confirmed by two specific but unreported rulings of the Secretary in Henry W. Parrott, A. 24363 and Mrs. Mae E. Burt, A. 24539, these rulings having been made in 1946 and 1947. Finally, the 1936 ruling with respect to the Executive Order and the Taylor Grazing Act was repeated in regulations issued in 1954 which are found in 43 CFR, Part 116. These regulations, also noted that "Most

of the lands affected by such regulations have been disposed of."

This consistent administrative position of the Secretary brings into play the legal principle that the courts will generally follow the interpretation given to a statute by the officer or agency charged with its administration, even if that interpretation is not the only reasonable one or possibly is not the result the court would have reached had the question arisen in the first instance in judicial proceedings. McLaren v. Fleischer, 256 U.S. 477, 41 S. Ct. 577, 65 L. Ed. 1052 (1921); United States v. Jackson, 280 U.S. 183, 50 S. Ct. 143, 74 L. Ed. 361 (1930); Udall v. Tallman, 380 U.S. 1, 85 S. Ct. 792, 13 L. Ed. 2d 616 (1965); Boesche v. Udall, 373 U.S. 472, 83 S. Ct. 1373, 10 L. Ed. 2d 491 (1963); Brennan v. Udall, 379 F. 2d 803 (10th Cir. 1967), cert. denied 389 U.S. 975, 88 S. Ct. 477, 19 L. Ed. 2d 468 (1967). In the *Jackson* case, the rule was stated in the following language:

> "It is a familiar rule of statutory construction that great weight is properly to be given to the construction consistently given to a statute by the Executive Department charged with its administration. [Citing authorities] And such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required." 280 U.S. at 193, 50 S. Ct. at 146.

The Secretary of the Interior for many years prior to issuance of the Pottharst patent had ruled that abandoned military reservation lands are "public lands" of the United States and are subject to the general public land laws including specifically Section 7 of the Taylor Grazing Act. One of these public land laws is the 1914 Act which required that the mineral rights be reserved from the Pottharst patent.

THE DOCTRINE OF ACQUIESCENCE

[11] Also applicable in this case is the doctrine of acquiescence, which has also been termed laches or administrative estoppel. This principle has been established both by the courts and by numerous Interior Department rulings for the purpose of insuring an orderly administration of the public land laws of the United States by its executive officers.

In the present case, John E. Pottharst voluntarily signed the mineral waiver in which he consented that the mineral rights be reserved by the United States under the 1914 Act. This followed determination by the Department of the Interior that the lands were valuable for minerals. Thereafter, a formal patent containing the mineral reservation was issued to Pottharst. Pottharst placed this patent of record and, in a subsequent recorded sale to Delta, formally acknowledged that his title had been acquired by the patent and that the mineral rights were outstanding in the United States. The same acknowledgment was made by the Pottharst heirs in the succession of their deceased father. No action has ever been taken by Pottharst or any of the defendants to challenge the mineral reservation in proceedings before the Secretary of the Interior; and except for the 1966 State court suit, no judicial action was attempted by the defendants in the assertion of their claims. In the meantime, bona fide rights in Getty and Gulf were created through the acquisition of the federal lease affecting the property and, as was previously noted, Getty and Gulf have now expended nearly $2.5 million in the mineral development of the property under that lease.

Under these factual circumstances, acquiescence decisions such as Brennan v. Udall, 379 F. 2d 803 (1967), cert.

denied 389 U.S. 975, 88 S. Ct. 477, 19 L. Ed. 2d 468, are applicable. The court in *Brennan* was confronted with the contention that a mineral reservation should not have been inserted in the patent at all because the entry of the patentee had been made prior to the adoption of the 1914 statute requiring that reservation. In holding that the plaintiff could not belatedly attack the reservation, the court said:

> "Prior to submitting his final proof, which was subsequent to the 1916 classification of the land as a valuable source of petroleum and nitrogen, Baxter freely consented that his entry be considered as made under the 1914 Act and that the patent, when issued to him, should contain the reservations provided for in that Act. At that time he had the right to show that the lands were non-mineral in character and receive accordingly an unrestricted patent. Instead, he chose to accept the patent with the reservations, and an attack upon it by his successors in interest almost fifty years after its issuance comes too late." 379 F. 2d at 807.

The application of this doctrine by the Interior Department in Conrad Luft, 63 I.D. 46 (1956) is worthy of note. There an unconditional final certificate had been issued to the entryman which did not contain or make any reference to a mineral reservation. The mineral reservation was then erroneously incorporated in the patent. Demand was made by the patentee for a supplemental patent which would exclude the mineral reservation. This was denied by the Solicitor in his ruling where he said:

> "In the instant case, the patentee accepted the restricted patent in 1919 without objection, his successors took title with full knowledge of the reservation, and the appellant held the title for 24 years before requesting

relief. In the meantime the Department has issued an oil and gas lease for the lands involved."

Brennan and *Luft* are typical of the circumstances under which the doctrine of acquiescence is invoked. The present case suggests the need for the application of the principle. Here the defendants and their ancestor, John E. Pottharst, did much more than remain passive without asserting their rights. They took affirmative action in several instances to acknowledge that the mineral rights in this property were outstanding in the United States, and they allowed the bona fide rights of Getty and Gulf to intervene. Even if their technical claims were otherwise found to be valid, they would be barred to assert them at this late date.

CONCLUSION

The disposition of the foregoing issues eliminates the need to consider the special pleas urged by the United States and by Getty and Gulf as cross-claimants. The court feels impelled to comment, however, that if necessary, the plea of estoppel would appear to be appropriate here in view of the equities favoring the United States, Getty and Gulf.

Considering the foregoing reasons, which constitute the court's findings of fact and conclusions of law, plaintiff and plaintiffs in cross-claim shall present a final judgment in accordance with the views expressed herein.

JUDGMENT OF DISTRICT COURT

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 69-74

Section "E"

UNITED STATES OF AMERICA

Plaintiff

versus

DELTA DEVELOPMENT COMPANY, INC., JOHN E. POTTHARST, JR., individually and as a residuary legatee and dative testamentary co-executor of the Succession of Mildred Heintz Pottharst, MILDRED POTTHARST ELLIS, individually and as a residuary legatee and dative testamentary co-executor of the Succession of Mildred Heintz Pottharst, VIOLA POTTHARST ROWLAND, individually and as a residuary legatee of Mildred Heintz Pottharst, GETTY OIL COMPANY, GULF OIL CORPORATION, THOMAS CONNELL and THE LOUISIANA LAND AND EXPLORATION COMPANY

Defendants

JUDGMENT

This cause having come on for trial and having been duly submitted for trial on the merits on the existing record by stipulation of all parties, and the Court having considered oral arguments and briefs, and delivered its written opinion on November 16, 1970, constituting the Court's findings of

fact and conclusions of law, judgment pursuant thereto having been signed on January 11, 1971, a motion for new trial having been filed on behalf of defendants, Delta Development Company, Inc. and the Pottharst heirs in their various capacities above set forth, being John E. Pottharst, Jr., Mildred Pottharst Ellis and Viola Pottharst Rowland, the same having been duly argued and submitted to the Court for a decision, and, the Court by minute entry of March 16, 1971, having concluded in connection therewith that the foregoing judgment had erroneously failed to sustain the motion to dismiss filed on behalf of the defendants, Delta Development Company, Inc., Mildred H. Pottharst, John E. Pottharst, Jr., Mildred Pottharst Ellis and Viola Pottharst Rowland, with reference to the claim for fissionable source materials, the Court ordered that the above judgment of January 11, 1971, be amended to sustain the said defendants' motion to dismiss with reference to the claim for fissionable source materials, the Court further ordering that otherwise and in all other respects the motion for a new trial be denied, with the Court directing the respective parties to agree to the form of the amended judgment and submit same to the Court, and the parties hereto having agreed upon and submitted this form of judgment, as evidenced by the signatures of the parties and/or their attorneys of record herein which appear at the foot of this judgment:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the plaintiff, the United States of America, and against the defendants, Delta Development Company, Inc., John E. Pottharst, Jr., individually and as a residuary legatee and dative testamentary co-executor of the Succession of Mildred Heintz Pottharst, Mildred Pottharst

Ellis, individually and as a residuary legatee and dative testamentary co-executor of the Succession of Mildred Heintz Pottharst, and Viola Pottharst Rowland, individually and as a residuary legatee of Mildred Heintz Pottharst, quieting the title of the United States as against any claims and contentions of said defendants to all the oil, gas, sulphur, potash and sodium in and under the following described property, situated in the Parish of Plaquemines, Louisiana, to-wit:

> Lots one and two and the northeast quarter of the southeast quarter of Section twenty-two, the south half of Section twenty-three, the north half of Section twenty-six, Lots one, two, three, four, five, and six, the south half of the northeast quarter; the southeast quarter of the northwest quarter, the east half of the southwest quarter, and the southeast quarter of Section twenty-seven, and the Section thirty-five in Township twenty-one south of Range twenty-eight east of the Louisiana Meridian, Louisiana, containing one thousand nine hundred twenty-one acres and sixty-two hundredths of an acre, according to the Official Plat of the Survey of the said Land, on file in the Bureau of Land Management.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the defendants, Delta Development Company, Inc., John E. Pottharst, Jr., individually and as a residuary legatee and dative testamentary co-executor of the Succession of Mildred Heintz Pottharst, Mildred Pottharst Ellis, individually and as a residuary legatee and dative testamentary co-executor of the Succession of Mildred Heintz Pottharst, and Viola Pottharst Rowland, individually and as a residuary legatee of the Succession of Mildred Heintz Pottharst, and against the United States of America, dismissing the claim of the United States of America

to all uranium, thorium or any other material which is or may be determined to be peculiarly essential to the production of fissionable materials, whether or not of commercial value, in and under the lands previously described herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff United States of America has title to all of the oil, gas, sulphur, potash and sodium and the right to prospect for, mine, and remove such deposits in the above described property, subject only to the oil and gas lease hereinafter described, and that the defendants Delta Development Company, Inc., John E. Pottharst, Jr., individually and as a residuary legatee and dative testamentary co-executor of the Succession of Mildred Heintz Pottharst, Mildred Pottharst Ellis, individually and as a residuary legatee and dative testamentary co-executor of the Succession of Mildred Heintz Pottharst, and Viola Pottharst Rowland, individually and as a residuary legatee of Mildred Heintz Pottharst, have no title or claim to the oil, gas, sulphur, potash and sodium.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the plaintiffs in cross-claim, Getty Oil Company and Gulf Oil Corporation, and against the defendants Delta Development Company, Inc., John E. Pottharst, Jr., individually and as a residuary legatee and dative testamentary co-executor of the Succession of Mildred Heintz Pottharst, Mildred Pottharst Ellis, individually and as a residuary legatee and dative testamentary co-executor of the Succession of Mildred Heintz Pottharst, and Viola Pottharst Rowland, individually and as a residuary legatee of Mildred Heintz Pottharst, recognizing and decreeing that said plaintiffs in cross-claim have valid oil and gas lease

hold rights relating to the properties hereinabove described under and by virtue of that certain oil, gas and mineral lease granted by the United States of America to Thomas Connell, effective May 1, 1954, bearing BLM No. 036201 of the records of the Department of the Interior and recorded in Conveyance Book 188, Folio 440, Entry No. 122 of the records of Plaquemines Parish, Louisiana, said leasehold rights being free of any claims of the defendants and being subject only to the overriding royalty rights of the additional defendants Thomas Connell and The Louisiana Land and Exploration Company.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the plaintiff, the United States of America, and the plaintiffs in cross-claim, Getty Oil Company and Gulf Oil Corporation, permanently enjoining and restraining Delta Development Company, Inc., John E. Pottharst, Jr., individually and as a residuary legatee and dative testamentary co-executor of the Succession of Mildred Heintz Pottharst, Mildred Pottharst Ellis, individually and as a residuary legatee and dative testamentary co-executor of the Succession of Mildrd Heintz Pottharst, and Viola Pottharst Rowland, individually and as a residuary legatee of Mildred Heintz Pottharst, their officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them, from asserting or claiming any title or interest in and to the oil, gas, sulphur, potash and sodium; and also permanently enjoining the defendant, Delta Development Company, Inc., its officers, agents, servants, employees and attorneys from prosecuting or attempting to prosecute that certain action now pending in the Twenty-fifth Judicial District Court in and for the Parish of Plaquemines, State of

Louisiana, entitled "Delta Development Company, Inc. v. Tidewater Oil Company," No. 9058 on the docket of said Court.

IT IS FURTHER ORDERED that the defendants Delta Development Company, Inc., John E. Pottharst, Jr., individually and as a residuary legatee and dative testamentary co-executor of the Succession of Mildred Heintz Pottharst, Mildred Pottharst Ellis, individually and as a residuary legatee and dative testamentary co-executor of the Succession of Mildred Heintz Pottharst, and Viola Pottharst Rowland, individually and as a residuary legatee of Mildred Heintz Pottharst, pay all the costs of this action.

This judgment supersedes and replaces in its entirety the judgment signed by this Court on January 11, 1971.

NEW ORLEANS, LOUISIANA, April 8, 1971.

s/FRED J. CASSIBRY
UNITED STATES DISTRICT JUDGE

ENTERED: April 8, 1971

STATUTES, REGULATIONS AND EXECUTIVE ORDERS

STATUTES:

Section 6 of the Act of June 12, 1858, 11 Stat. 332, 336

SEC. 6. *And be it further enacted*, That all the existing laws, or parts of laws which authorize the sale of military sites which are or may become useless for military purposes be, and the same are hereby, repealed, and said lands shall not be subject to sale or preemption under any of the laws of the United States: *Provided, further*, That the provisions of the act of August eighteenth, eighteen hundred and fifty-six, relative to certain reservations in the State of Florida, shall continue in force.

APPROVED, June 12, 1858.

Act of July 5, 1884, 23 Stat. 103, 43 U.S.C. 1071, et seq.

FORTY-EIGHTH CONGRESS. SESS. I. CH. 214. 1884.

CHAP. 214.—An act to provide for the disposal of abandoned and useless military reservations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever, in the opinion of the President of the United States, the lands, or any portion of them, included within the limits of any military reservation heretofore or hereafter declared, have become or shall become useless for military purposes, he shall cause the same or as much thereof as he may

designate, to be placed under the control of the Secretary of the Interior for disposition as hereinafter provided, and shall cause to be filed with the Secretary of the Interior a notice thereof.

SEC. 2. That the Secretary of the Interior may, if in his opinion the public interests so require, cause the said lands, or any part thereof, in such reservations, to be regularly surveyed, or to be subdivided into tracts of less than forty acres each, and into town lots, or either, or both. He shall cause the said lands so surveyed and subdivided, and each tract thereof, to be appraised by three competent and disinterested men to be appointed by him, and who shall, after having each been first duly sworn to impartially and faithfully execute the trust reposed in them, appraise the said lands, subdivisions, and tracts, and each of them, and report their proceedings to the Secretary of the Interior for his action thereon. If such appraisement be disapproved, the Secretary of the Interior shall again cause the said lands to be appraised as before provided; and when the appraisement has been approved he shall cause the said lands, subdivisions, and lots to be sold at public sale, to the highest bidder for cash, at not less than the appraised value thereof, nor less than one dollar and twenty-five cents per acre, first having given not less than sixty days' public notice of the time, place, and terms of sale, immediately prior to such sale, by publication in at least two newspapers having a general circulation in the country or section of county where the lands to be sold are situate; and any lands, subdivisions, or lots remaining unsold may be reoffered for sale at any subsequent time in the same manner, at the discretion of the

Act of July 5, 1884 (Continued)

Secretary of the Interior; and if not sold at such second offering for want of bidders, then the Secretary of the Interior may sell the same at private sale, for cash, at not less than the appraised value, nor less than one dollar and twenty-five cents per acre: *Provided*, That any settler who was in actual occupation of any portion of any such reservations prior to the location of such reservation, or settled thereon prior to January first, eighteen hundred and eighty-four, in good faith for the purpose of securing a home and of entering the same under the general laws and has continued in such occupation to the present time, and is by law entitled to make a homestead entry shall be entitled to enter the land so occupied, not exceeding one hundred and sixty acres in a body, according to the Government surveys and subdivisions: *Provided further*, That said lands were subject to entry under the public land laws at the time of their withdrawal: *And provided further*, That all patents heretofore issued, and approved State selections, covering any lands within the old Fort Lyon Military Reservation in the State of Colorado, declared by executive order of August eighth, eighteen hundred and sixty-three, are hereby confirmed; and the rights of all entrymen and settlers on said reservation to acquire title under the homestead, preemption, or timber-culture laws are hereby recognized and affirmed to the extent they would have attached had public land been settled upon or entered; and such portions of said reservation as shall not have been entered or settled upon as aforesaid shall be disposed of by the Secretary of the Interior under the provisions of this act, including lands that may be abandoned by settlers or entrymen.

Act of July 5, 1884 (Continued)

SEC. 3. That the Secretary of the Interior shall cause any improvements, buildings, building materials, and other property which may be situate upon any such lands, subdivisions or lots not heretofore sold by the United States authorities, to be appraised in the same manner as hereinbefore provided for the appraisements of such lands, subdivisions, and lots, and shall cause the same, together with the tract or lot upon which they are situate, to be sold at public sale, to the highest bidder for cash at not less than the appraised value of such land and improvements, first giving the sixty days' notice as hereinbefore provided; or he may, in his discretion, cause the improvements to be sold separately, at public sale for cash, at not less than the appraised value, to be removed by the purchaser within such time as may be prescribed, first giving the sixty days' public notice, before provided; and if in any case the lands and improvements, or the improvements separately, as the case may be, are not sold for want of bidders, then the Secretary of the Interior may, in his discretion, cause the same to be reoffered for sale, at any subsequent time, in the same manner as above provided, or may cause the same to be sold at private sale for not less than the appraised value: *Provided*, That where buildings or improvements have been heretofore sold by the United States authorities the land upon which such buildings or improvements are situate not exceeding the smallest subdivision or lot provided for by this act upon the reservation on which said buildings are situate shall be offered for sale to the purchaser of said improvements and buildings at the appraised value of the lands and if said purchaser shall fail for sixty days after notice to complete said purchase of lands the

Act of July 5, 1884 (Continued)

same shall be sold under the provisions of this act: *And provided further* That the proceeds of the military reservation lands sold on Bois Blanc Island near to Fort Mackinaw military reservation shall be set apart as a separate fund for the improvement of the National Park on the Island of Mackinaw Michigan under the direction of the Secretary of War.

SEC. 4. That the provisions of the act of August eighteenth, eighteen hundred and fifty-six, relative to military reservations in the State of Florida, and the sixth section of the act of June twelfth, eighteen hundrey and fifty-eight, relative to the sale of military sites be, and the same are hereby, repealed.

SEC. 5. Whenever any lands containing valuable mineral deposits shall be vacated by the reduction or abandonment of any military reservation under the provisions of this act, the same shall be disposed of exclusively under the mineral land laws of the United States.

SEC. 6. The Secretary of War shall have authority, in his discretion, to permit the extension of State, county, and Territorial roads across military reservations; to permit the landing of ferries, the erection of bridges thereon; and permit cattle, sheep or other stock animals to be driven across such reservation, whenever in his judgment the same can be done without injury to the reservation or inconvenience to the military forces stationed thereon.

Approved, July 5, 1884.

Act of July 17, 1914, 38 Stat. 509, 30 U.S.C. 121, et seq.

CHAP. 142—An Act to provide for agricultural entry of lands withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic minerals.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same; but no desert entry made under the provisions of this Act shall contain more than one hundred and sixty acres: *Provided,* That all applications to locate, select, enter, or purchase under this section shall state that the same are made in accordance with and subject to the provisions and reservations of this Act.

SEC. 2. That upon satisfactory proof of full compliance with the provisions of the laws under which the location, selection, entry, or purchase is made, the locator, selector, entryman, or purchaser shall be entitled to a patent to the land located, selected, entered, or purchased, which patent shall contain a reservation to the United States of the deposits on account of which the lands so patented were withdrawn or classified or reported as valuable, together with the right to prospect for,

mine, and remove the same, such deposits to be subject to disposal by the United States only as shall be hereafter expressly directed by law. Any person qualified to acquire the reserved deposits may enter upon said lands with a view of prospecting for the same upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting, the measure of any such damage to be fixed by agreement of parties or by a court of competent jurisdiction. Any person who has acquired from the United States the title to or the right to mine and remove the reserved deposits, should the United States dispose of the mineral deposits in lands, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the minerals therefrom, and mine and remove such minerals, upon payment of damages caused thereby to the owner of the land, or upon giving a good and sufficient bond or undertaking therefor in an action instituted in any competent court to ascertain and fix said damages: *Provided*, That nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, select, enter, or purchase, under the land laws of the United States, lands which have been withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic mineral lands, with a view of disproving such classification and securing patent without reservation, nor shall persons who have located, selected, entered, or purchased lands subsequently withdrawn, or classified as valuable for said mineral deposits, be debarred from the privilege of showing,

Act of July 17, 1914 (Continued)

at any time before final entry, purchase, or approval of selection or location, that the lands entered, selected, or located are in fact nonmineral in character.

SEC. 3. That any person who has, in good faith, located, selected, entered, or purchased, or any person who shall hereafter locate, select, enter, or purchase, under the nonmineral land laws of the United States, any lands which are subsequently withdrawn, classified, or reported as being valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals, may, upon application therefor, and making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which patent shall contain a reservation to the United States of all deposits on account of which the lands were withdrawn, classified, or reported as being valuable, together with the right to prospect for, mine, and remove the same.

Approved, July 17, 1914.

Act of March 4, 1933, 47 Stat. 1570, 30 U.S.C. 124

§ 124. Agricultural entry or purchase of lands withdrawn or classified as containing sodium or sulphur

Lands withdrawn, classified, or reported as valuable for sodium and/or sulphur and subject to prospecting, leasing, or development under sections 181-194, 201, 202-208, 211-214, 223-229, 241, 251, and 261-263 of this title, shall be subject to appropriation, location, selection, entry, or purchase if otherwise available in the form and manner and subject to

the reservations, provisions, limitations, and conditions of sections 121, 122, and 123 of this title: *Provided, however,* That lands lying within the geologic structure of a field, or withdrawn, classified, or reported as valuable for any of the minerals named herein and or in any of said sections, or upon which leases or prospecting permits have been applied for or granted, for the production of any of such minerals, shall not be subject to such appropriation, location, selection, entry, or purchase unless it shall be determined by the Secretary of the Interior that such disposal will not unreasonably interfere with operations under said sections. Mar. 4, 1933, c. 278, 47 Stat. 1570.

Taylor Grazing Act, Section 7 of the Act of June 28, 1934, 48 Stat. 1272, as amended by Section 2, Title I, of the Act of June 26, 1936, 49 Stat. 1976, 43 U.S.C. 315f

[CHAPTER 842.]

AN ACT

To amend the Act entitled "An Act to stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes", approved June 28, 1934 (48 Stat. 1269).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of section 1 of the Act entitled "An Act to stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly

Taylor Grazing Act, Section 7 of the Act of June 28, 1934
(Continued)

use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes", approved June 28, 1934, is amended by striking out the words "eighty million" and inserting in lieu thereof the words "one hundred and forty-two million".

SEC. 2. Section 7 of such Act is amended to read as follows:

"SEC. 7. That the Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this Act, or proper for acquisition in satisfaction of any outstanding lieu, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: *Provided*, That locations and entries under the mining laws, including the Act of February 25, 1920, as amended, may be made upon such withdrawn and reserved areas without regard to classification and without restrictions or limitation by any

Taylor Grazing Act, Section 7 of the Act of June 28, 1934
(Continued)

provision of this Act. Where such lands are located within grazing districts reasonable notice shall be given by the Secretary of the Interior to any grazing permitee of such lands. The applicant, after his entry, selection, or location is allowed, shall be entitled to the possession and use of such lands: *Provided*, That upon the application of any applicant qualified to make entry, selection, or location, under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select, or locate such lands if opened to entry as herein provided."

Section 5 of the Act of March 3, 1887, 24 Stat. 557, 43 U.S.C. 898

§ 898. *Rights of purchasers from railroads of coterminous lands not within grants.* Where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said bona fide

Section 5 of the Act of March 3, 1887 (Continued)

purchaser, his heirs or assigns. *Provided*, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the preemption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said preemption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further*, That this section shall not apply to lands settled upon subsequent to the 1st day of December, 1882, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases. (Mar. 3, 1887, c. 376, § 5, 24 Stat. 557.)

Pickett Act, Section 1 of the Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. 141

Section 141. *Withdrawal and reservation of lands for water-power sites or other purposes.* The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of land, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress. (June 25, 1910, c. 421, § 1, 36 Stat. 847.)

DEPARTMENT OF THE INTERIOR REGULATIONS

CODE OF FEDERAL REGULATIONS

TITLE 43—PUBLIC LANDS: INTERIOR

1946 SUPPLEMENT

Subtitle A—Office of the Secretary of the Interior

§ 01.2 *Organization in general.* The Department of the Interior consists of the Office of the Secretary and the various operating bureaus and agencies. The organizations and procedures of the bureaus and agencies are set out under the appropriate titles of this Code. The following sections of this part deal with the Office of the Secretary.

OFFICE OF THE SECRETARY

§ 01.10 *Secretary of the Interior.* The Secretary of the Interior is the head of the Department and is charged with the supervision and direction of the functions performed and activities carried on by the offices and employees throughout the Department. All bureaus and offices of the Department are responsible directly to the Secretary.

§ 01.11 *Under Secretary, Assistant Secretaries.* The Under Secretary and the two Assistant Secretaries are the chief administrative officials of the Department under the Secretary of the Interior. In the absence or unavailability of the Secretary, the bureaus and offices of the Department are directly responsible to the Under Secretary. The Under Secretary and the Assistant Secretaries are authorized to exercise the powers

of the Secretary with respect to matters which come before them, and, in certain cases, to serve as Acting Secretary of the Interior. (See §§ 1.0-1.3 of this sub-title.).

§ 01.12 *Solicitor.* The Solicitor is the chief law officer of the Department and the adviser on legal matters to the Secretary and other departmental officers. He is charged with the supervision of the legal work and legal staffs of the entire Department. The Solicitor is responsible for patent policies and procedures within the Department, and for the administrative adjustment of tort claims under the Federal Tort Claims Act (Title IV, Pub. Law 601, 79th Cong., 60 Stat. 842). (See §§ 1.20, 1.21 of this subtitle.) The Solicitor's immediate staff constitutes the Office of the Solicitor.

* * *

§ 01.21 *Program staff offices.* The following staff offices coordinate various aspects of the functions performed by the Department and advise the Secretary on matters of policy:

* * *

(c) The Office of Land Utilization coordinates all land classification, use, and management programs to insure consistency with departmental policy. It also assists the Secretary in developing departmental policy on land management matters and renders advisory services to the bureaus. An Assistant to the Secretary is in charge of the office.

* * *

§ 1.0 *Authority of Under Secretary and Assistant Secretaries.* The Under Secretary and each Assistant Secretary

may exercise all of the powers, authority, and discretion of the Secretary of the Interior with respect to any matter which comes before them respectively.

§ 4.1 *Policy supervision.*

* * *

(b) Assistant Secretary Gardner is assigned the initial responsibility for all matters connected with departmental program coordination and Assistant Secretary Davidson the initial responsibility for all matters connected with departmental regionalization. From time to time there will in addition be assigned specific problems or problem areas to the Assistant Secretaries. With respect to any such assignment all bureaus and offices will in the normal course consult initially the specified Assistant Secretary on all questions of policy, program or administration which may require Secretarial attention and are connected with such assignments.

* * *

§ 4.250 *General functions.* Pursuant to the provisions of section 403 (c) of Reorganization Plan No. 3 of 1946 (Title 3, Chapter IV, *supra*), the functions and powers of the Grazing Service, the General Land Office, the Director of Grazing, all Assistant Directors of the Grazing Service, the Commissioner of the General Land Office, the Assistant Commissioner of the General Land Office, all registers of the district land offices, and the United States Supervisor of Surveys, together with the Field Surveying Service, now known as the Cadastral Engineering Service, transferred to the Secretary of the Interior by section 403 of Reorganization Plan No. 3 of 1946, shall,

subject to the direction and control of the Secretary and to such regulations as the Secretary deems proper, be exercised by the Director of the Bureau of Land Management. The Director, with the approval of the Secretary, may perform these functions through such officers or organizational units of the Bureau of Land Management as he may designate. [Order 2223, July 15, 1946, effective July 16, 1946, 11 F.R. 7776]

* * * *

ORIGINAL EDITION:

Subtitle B—Public Land Regulations

Part 102—Agricultural Entries on Mineral Lands

* * * *

102.23 *Lands to which Act of July 17, 1914 is applicable.* The Act of July 17, 1914 is general and comprehensive and operates in all the States containing public lands of the character specified. It does not apply to lands in the Territory of Alaska, or to lands in the United States which for other reasons are not available or which, in other words, are not subject to entry. This statute fully covers the field included in the special Acts of August 24, 1912 (37 Stat. 496), providing for certain agricultural entries and selections on oil and gas lands in the State of Utah, and of February 27, 1913 (37 Stat. 687), authorizing selections by the State of Idaho of phosphate and oil lands in that State. This broad and general Act supersedes and displaces said special laws, and by implication works their repeal. Therefore, all entries, selections, or locations of lands of the character described in those special

statutes made in the States mentioned on or after date of this general Act, July 17, 1914, will be treated as within the scope of the latter Act, and will be adjudicated thereunder. Also, all such entries, selections, or locations made under those special acts prior to, and not perfected at, that date will be carried to completion, approved, and patented, if at all, under the general Act.* [Par. 1, Circ. 393, Mar. 20, 1915, 44 L.D. 33]

102.24 *Practice and procedure.* The Act of July 17, 1914 in many respects resembles that of March 3, 1909 (35 Stat. 844; 30 U.S.C. 81), which provides for the protection of the surface rights of entryman upon lands subsequently classified, claimed, or reported as coal lands, and also, that of June 22, 1910 (36 Stat. 583; 30 U.S.C. 83-85), authorizing certain forms of agricultural entries and selections on withdrawn or classified coal lands. The general instructions under these Acts as set forth in §§ 102.1-102.16, 250.26, 250.27, 270.21, may be followed, so far as applicable, in matters of practice and procedure.* [Par. 3, Circ. 393, Mar. 20, 1915, 44 L.D. 34]

102.25 *Procedure on reports as to oil and gas, involving nonmineral entries, prior to proof, or after proof and prior to patent.* Where the Geological Survey reports that land embraced in a nonmineral entry or claim on which final proof has not been submitted or which has not been perfected is in an area in which valuable deposits of oil and gas may occur because of the absence of reliable evidence that the land is affected by geological structure unfavorable to oil and gas accumulation, the entryman or claimant will be allowed 30 days from notice to furnish consent under the Act of July 17,

1914 (38 Stat. 509; 30 U.S.C. 121-123), or to apply for reclassification of the land as nonmineral, submitting a showing therewith, and to apply for a hearing in event reclassification is denied, or to appeal. He must be advised that if a hearing is ordered the burden of proof will be upon him, and also that if he shall fail to take one of the actions indicated, his entry or claim will be canceled.

In a case where acceptable final proof has been submitted, or a claim has been perfected, and the Geological Survey thereafter makes report, as in the above or similar form, such report will not be relied upon as basis for adverse proceedings against the entry or claim unless the Government is prepared to assume the burden of proving, prima facie, that the land was known to be of mineral character, at the date of acceptable final proof or when the claim was completed, according to the established criteria for determining mineral from nonmineral lands, among which may be those recognized by the Supreme Court in the case of United States v. Southern Pacific Company et al. (251 U. S. 1, 64 L. ed. 97). If the Government is thus prepared to assume such burden of proof, the General Land Office will institute adverse proceedings against the entry or claim, making a charge to that effect, giving the entryman or claimant the option of refuting the charge in accordance with Part 222 or of consenting to the reservation of the oil and gas to the United States, and thereby avoiding the expense of litigation. The entryman or claimant will be advised that in the event hearing is had, the burden of proof will be upon the Government; also, that if he shall fail to make answer or to exercise the option offered him within the

time allowed, the entry or claim will be canceled without further notice.* [Circ. 1344, Jan. 19, 1935, 55 I.D. 120]

102.26 *Patent with reservation.* Section 3 of the Act of July 17, 1914 (38 Stat. 510; 30 U.S.C. 123) is both retrospective and prospective, and under it any person who prior to the Act, had applied, or who after the passage of the Act, shall apply for lands which are subsequently withdrawn, classified or reported as being valuable for the specified minerals, and which are otherwise available, may upon application therefor, and the making of satisfactory proof, receive a patent with a reservation. In this particular the statute is quite similar to that of March 3, 1909 (35 Stat. 844; 30 U.S.C. 81), and the disposition of such cases will follow the practice under that Act insofar as the same is applicable.* [Par. 4, Circ. 393, Mar. 20, 1915, 44 L.D. 34].

102.27 *Notations on applications; statements in orders of withdrawal.* All applications to locate, select, enter, or purchase lands under the Act of July 17, 1914, before being accepted and filed by the register, must have written, stamped, or printed upon their face the following:

> Application made in accordance with, and subject to the provisions and reservations of the Act of July 17, 1914 (38 Stat. 509).

Like notations will be made by registers upon the face of the notices of allowance issued on applications filed under this Act.

Orders of withdrawal under the Reclamation Act of lands withdrawn, classified, or reported as valuable for the

specified minerals with a view to passing title to the same in accordance with the terms of this Act, will state that such withdrawal is made in accordance with and subject to the provisions and reservations of the Act of July 17, 1914.* [Par. 5, Circ. 393, Mar 20, 1915, 44 L.D. 34]

102.28 *Reservations in final certificates and patents.* Final certificates issued to nonmineral claimants under this Act will contain the following provision, which the register will cause to be written or stamped thereon:

> Patent to contain provisions, reservations, conditions, and limitations of the Act of July 17, 1914 (38 Stat. 509).

There will be incorporated in patents issued to nonmineral claimants under this Act the following:

> Excepting and reserving, however, to the United States all the [deposit on account of which the lands are withdrawn, classified, or reported as valuable—phosphate, oil, or other mineral, as the case may be] in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove such deposits from the same upon compliance with the conditions and subject to the provisions and limitations of the Act of July 17, 1914 (38 Stat. 509).

* * *

Part 296 Classifications

Classification and Entry of Lands Affected by General Orders of Withdrawal, or Within a Grazing District

* * *

296.7 *Action on application, after classification of lands.* If the Secretary of the Interior approves the classifica-

tion of the land as subject to disposal under the public land laws, the General Land Office will pass upon the qualifications of the applicant and determine whether he may be allowed to acquire title to the land under the application. If it should be determined that the land may not be disposed of under the law specified by the applicant, the application for entry, selection or location will be rejected and the applicant allowed thirty days from receipt of notice within which to file response to the notice of the report furnished him. At the applicant's option he may either appeal from the finding to the Secretary of the Interior, alleging errors of law, or he may present further showing as to the facts by affidavit, accompanied by such evidence as is desired tending to disprove the adverse conclusion reached. Such appeal or further showing will be forwarded by the register to the General Land Office. If the evidence submitted warrants it, favorable action may be taken, but if the conclusion be still adverse, it will be transmitted to the Secretary of the Interior with report. In cases where the applicant fails to furnish a showing or to appeal from the order of the General Land Office requiring him to furnish it within the thirty days allowed, or where the Secretary refuses to open the land to disposition, final action will be taken, and the case closed by the General Land Office. The register will allow no such application until instructed to do so by the General Land Office. [Par. 6, Circ. 1353b, June 29, 1937]

* * *

296.13 *Classification effective unless revoked; land may be classified for disposal under some other law.* The classification referred to in the preceding section will remain

effective unless revoked, but will not preclude the filing and consideration of petitions for classification of the land as subject to disposition under some other public land law.* [Circ. 1443, Jan. 20, 1938]

* * *

CUMULATIVE SUPPLEMENT BOOK 7:

Part 296—Classifications

§ 296.4 *Execution and filing of petitions for classification.*

NOTE: § 296.4 was amended by inserting immediately preceding the last sentence thereof the following, by Circular 1523, Jan. 14, 1943, 8 F.R. 1148:

If the land or any part of it is withdrawn or classified or is valuable for deposits of coal, oil, gas, potash, phosphate, sodium, oil shale or (in Louisiana and New Mexico) sulphur, the petition for classification must show:

(a) Whether the purpose for which the title is sought is necessary and in the interest of the public;

(b) Whether the applicant lawfully could devote the land to the proposed use without obtaining title; and

(c) Whether the applicant reasonably could obtain other land, either public or privately owned, which could serve the purpose desired substantially as well as the land applied for.

EXECUTIVE ORDERS:

EXECUTIVE ORDER 6964

43 C.F.R. 297.12

WITHDRAWAL FOR CLASSIFICATION OF ALL PUBLIC LAND IN CERTAIN STATES

WHEREAS title II of the National Industrial Recovery Act, of June 16, 1933 (ch. 90, 48 Stat. 195), provides among other things for the preparation of a comprehensive program of public works which shall include among other matters the conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, and flood control; and

WHEREAS in furtherance of the said act the Special Board for Public Works appointed by Executive Order No. 6174, of June 16, 1933, has by its resolution of July 18, 1934, included in the comprehensive program of public works contemplated by title II of the National Industrial Recovery Act certain projects known as "The Land Program, Federal Emergency Relief Administration"; and

WHEREAS the said Land Program contemplates the use of public lands in the States of Alabama, Arkansas, Florida, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, Oklahoma, Washington, and Wisconsin for projects concerning the conservation and development of forests, soil, and other natural resources, the creation of grazing districts, and the establishment of game preserves and bird refuges; and

WHEREAS I find and declare that it is necessary to classify all the unreserved and unappropriated lands of the public domain within the said States for the purpose of the effective administration of the said Land Program:

NOW, THEREFORE, by virtue of and pursuant to the authority vested in me by the act of June 25, 1910 (ch. 421, 36 Stat. 847), as amended by the act of August 24, 1912 (ch. 369, 37 Stat. 497), and subject to the conditions therein expressed and to valid existing rights, it is ordered that all the public lands in the States of Alabama, Arkansas, Florida, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, Oklahoma, Washington, and Wisconsin be, and they are hereby, temporarily withdrawn from settlement, location, sale, or entry, and reserved for classification and pending determination of the most useful purposes to which said lands may be put in furtherance of said Land Program, and for the conservation and development of natural resources.

Public lands within any of the States herein enumerated which are on the date of this order under an existing reservation for a public purpose are exempted from the force and effect of the provisions of this order so long as such existing reservation remains in force and effect.

This order shall continue in full force and effect unless and until revoked by the President or by an act of Congress.

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE,

February 5, 1935.

UNREPORTED LAND DEPARTMENT INSTRUCTIONS:

UNITED STATES

DEPARTMENT OF THE INTERIOR

OFFICE OF THE SECRETARY

WASHINGTON

JUN 4 1936

The Commissioner of the
General Land Office.

My dear Mr. Commissioner:

You have in your letter of May 7 (1633966 "L" CGF) requested instructions as to whether undisposed of lands within abandoned military reservations, turned over to this Department for disposal as provided in the acts of July 5, 1884 (23 Stat. 103), and August 23, 1894 (28 Stat. 491), or in special acts, should be regarded as unreserved public lands within the meaning of section 1 of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269). You further ask whether the lands of such abandoned military reservations which are not made part of any established grazing district should be held subject to lease under section 15 of the Taylor Grazing Act.

It is provided in section 1 of the last mentioned act that the Secretary of the Interior may establish grazing districts of vacant, unappropriatd, and unreserved lands from the public domain which are not in national forests, national parks, and monuments, Indian reservations, revested Oregon and Cali-

fornia Railroad grant lands, or revested Coos Bay Wagon Road grant lands.

By Executive Orders of November 26, 1934, and February 5, 1935, as amended, all vacant, unreserved and unappropriated public lands of the United States, including lands within abandoned military reservations, have been withdrawn from settlement, location, sale, or entry, and reserved for classification, and pending determination of the most useful purpose to which such land may be put in consideration of the provisions of said act of June 28, 1934, and for conservation and development of natural resources.

In its instructions of January 2, 1914 (43 L.D. 33), the Department held that lands in an abandoned military reservation included within a national forest were subject to listing and entry under the act of June 11, 1906, without regard to the act of July 5, 1884, saying:

> "It is true that the act of July 5, 1884, provides a specific method for the disposal of lands within the limits of abandoned military reservations, which method includes appraisal and sale, at not less than the appraised value, a method inconsistent with disposition under the so-called free homestead law. It is also true, as already stated, that the act of August 23, 1894, modifying the act first mentioned as to certain military reservations theretofore opened, has no application to the lands here involved. However, under section 24 of the act of March 3, 1891 (26 Stat. 1095), the President is authorized to 'set apart and reserve, in any State or Territory having public lands bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations,' and this Department and the courts have held that under this authority he may

withdraw lands in the public domain whether they be disposable under the general land laws or under some special and limited method. The case of *United States* v. *Blendaur* (128 Fed. 910) involved lands which it was contended were not 'public lands' but had been previously set apart for a special purpose, but the court held that the land was a part of the public domain and was public land of the United States within the intent and meaning of those words as used in the act of March 3, 1891, and when included in a national forest became a part thereof subject to administration and use as such. That this is correct would appear to require no extended argument."

The Executive Orders of withdrawal cited were made under the act of June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497). The former provides in section 1 that the President may withdraw any of the public lands of the United States for public purposes to be specified in the orders of withdrawals.

Lands in abandoned military reservations were included in the withdrawals and thereafter such lands were subject to use and disposition as provided in the several sections of the Taylor Grazing Act. Following the reasoning in the cited instructions of January 2, 1914, the lands within abandoned military reservations may now be included and used in grazing districts, and may be disposed of as provided in sections 7, 8, and 14 and leased as provided in section 15 of the Taylor Grazing Act.

Verly truly yours,

(SGD) T. A. Walters
First Assistant Secretary.

Supreme Court, U.S.
FILED
JAN 13 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-821

DELTA DEVELOPMENT COMPANY, INC., ET AL.,
Petitioners,

versus

UNITED STATES OF AMERICA, GETTY OIL COMPANY, GULF OIL CORPORATION, THOMAS CONNELL and THE LOUISIANA LAND AND EXPLORATION COMPANY,
Respondents.

BRIEF OF GETTY OIL COMPANY AND GULF OIL CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

No. 71-821

DELTA DEVELOPMENT COMPANY, INC., ET AL.,
Petitioners,

versus

UNITED STATES OF AMERICA, GETTY OIL COMPANY, GULF OIL CORPORATION, THOMAS CONNELL and THE LOUISIANA LAND AND EXPLORATION COMPANY,
Respondents.

BRIEF OF GETTY OIL COMPANY AND GULF OIL CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Getty Oil Company and Gulf Oil Comporation (herein "Getty" and "Gulf") oppose the petition for a writ of certiorari filed in this Court by petitioners, Delta Development Company, Inc., et al. Getty and Gulf, made respondents with the United States and others in that petition, are mineral lessess of the United States and have interests identical to the Government in this litigation; in addition, the two companies filed six cross claims in their original pleadings, asserting several special legal positions and defenses against the claims of the present petitioners.

D. ARGUMENT

It is submitted that no issue in this case can possibly be classified as one of those enumerated in Rule 19(b) of the Rules of this Court so as to justify granting of a writ of certiorari. And even if by remote chance such a signal issue is found to be present, the decision of the district court in favor of respondents must be sustained on other grounds involving *factual* determinations made by the lower court as well as routine and well-settled issues of law. The Court of Appeals for the Fifth Circuit found so little merit in the appeal from the comprehensive ruling of the district court that it handled the appeal summarily under its Rule 18.

Some of the more obvious reasons for the denial of the petition for a writ are these:

1.

The principal issue in this case is whether the United States validly reserved the mineral rights in certain Louisiana properties when these lands were conveyed by the Government to one John E. Pottharst in 1947. As an essential corollary to that question, the court below had to find whether in fact the Secretary of the Interior determined that these properties were valuable for minerals before the sale was made to Pottharst. It is clear that under any statute that may be held to govern the transaction, a sale including the minerals could not have been validly made if in fact this mineral

determination had previously been made by the Secretary.[1]

The district court made a painstaking analysis of all of the actions of the Interior Department in processing the Pottharst application and determined factually that the evidence was overwhelming that the lands were in fact classified as being valuable for minerals prior to the time that Pottharst acquired any vested rights therein. The court went further and stated that to hold otherwise would be to charge the Secretary with having committed a fraud on the United States, an allegation which was not made in the pleadings by petitioners.

The gravamen of petitioner's complaint to this Court in seeking a writ is a two-fold contention, first that the district court was erroneous in its factual findings concerning the mineral classification and second that the factual determination of the Secretary of the Interior made some twenty-two years earlier should be reviewed and overthrown by this Court.[2]

---

[1]Section 5 of the Act of July 5, 1884, 23 Stat. 104, on which petitioners rely, provides specifically that any lands valuable for minerals must be sold "exclusively under the mineral land laws of the United States." The Act of July 17, 1914, 38 Stat. 509, codified at 30 U.S.C. 121 et seq., which respondents have contended is applicable, is the broad public interest statute requiring the reservation of mineral rights from the sale of all lands of the United States where those lands have been classified as being valuable for minerals. For the complete text of these acts see pages 136-140 and 141-143 of the Appendix to the petition for a writ filed herein. All subsequent references herein to "App." are to this Appendix.

[2]A considerable portion of the petition for a writ is devoted to this subject. See pages 13 to 24 and 70 to 79 of the petition.

One of the more firmly settled principles of public land law, as established by several decisions of this Court, is that any question of fact decided by the Secretary is conclusive and is not open to relitigation in the courts. *Burfenning v. Chicago, St. P., M. & O. Ry. Co.*, 163 U.S. 321 (1896); *DeCambra v. Rogers*, 189 U.S. 119 (1903); *St. Louis Smelting and Refining Co. v. Kemp*, 104 U.S. 636 (1882). And, of course, a challenge to the factual rulings made by the district court and upheld by the court of appeal obviously presents no grounds for this Court to grant a writ under Rule 19.

Finally, petitioners, claiming as they do solely under John E. Pottharst, are in no position to challenge either the mineral classification of the land or the mineral reservation in the Pottharst patent. Well prior to the time that he acquired any rights in the land, Pottharst freely and voluntarily signed a "Mineral Waiver" in which he agreed that the property would be sold subject to the 1914 Act, thereby agreeing to the reservation of the minerals by the United States.[3]

2.

Petitioners also challenge the well reasoned decision of the lower court that the 1884 Act dealing with abandoned military reservation lands must be construed with the subsequent 1914 Mineral Reservation Act and that therefore the mineral rights were validly reserved by the United States from the sale to Pottharst under

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[3]See opinion of the district court, 322 F.Supp. 121, 125, 128, 131-132 (App. p. 113, 114 and 127-129).

the later statute. But in this connection petitioners failed signally to point out to the Court that this interpretation of the 1884 Act, as employed in the Pottharst transaction and approved by the court below, was in accordance with a consistent administrative construction given to that law by the Secretary for a period extending back fifty-five years prior to the filing of this suit.[4] This clearly brings into play the legal principal adopted by this Court that the courts will generally follow the interpretation given to a statute by the officer or agency charged with its administration, even if that interpretation is not the only reasonable one or possibly is not the result the court would have reached had the question arisen in the first instance in judicial proceedings. *McLaren v. Fleischer*, 256 U.S. 477 (1921); *United States v. Jackson*, 280 U.S. 183 (1930); *Udall v. Tallman*, 380 U.S. 1 (1965); *Boesche v. Udall*, 373 U.S. 472 (1963). The application of this principle is particularly appropriate in the present case dealing with abandoned military reservation lands since virtually all of these lands have now been disposed of, and a contrary ruling would cast a cloud on many titles.[5] Among these dispositions is the valuable oil, gas and mineral lease held by Getty and Gulf affecting the disputed minerals in this suit which had been developed at very substantial cost to these respondents prior to the judicial attack on the Pottharst patent.

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[4]See district court opinion for the series of regulations and rulings to this effect. 322 F.Supp. 121, 131 (App. p. 125-126).

[5]See the 1954 regulations of the Secretary, 43 C.F.R. Part 116 wherein it was stated: "Most of the lands affected by such regulations have been disposed of." The complete text of those regulations is shown as an addendum at page 9 herein.

In any event, the lower court's ruling is clearly sound in view of the fact that the 1884 statute was only a permissive one which gave the Secretary discretionary authority to sell, this in stark contrast to the restricted or "in praesenti" statutes that were dealt with in the cases relied on by petitioners. Also, as to the petitioners' contention that only the "mineral land" laws that were in effect in 1884 could be considered, both this court and appellate courts have uniformly held that where minerals or mineral laws are involved, subsequent statutes must be considered in construing grants of lands determined to be valuable for minerals, *Northern Pacific R.R. Co. v. Sanders*, 166 U.S. 620 1897); *Northern Pacific R.R. Co. v. Soderberg*, 188 U.S. 526 (1903) [and 104 F. 425 (9th Cir. 1900)]; *Nelson v. Northern Pacific R.R. Co.*, 188 U.S. 108 (1903); *West Coast Exploration Co. v. McKay*, 93 U.S. App. D.C. 307, 213 F.2d 582 (1954), cert. denied, 347 U.S. 989 (1954); *Anderson v. McKay*, 94 U.S. App. D.C. 11, 211 F.2d 798 (1954), cert. denied, 348 U.S. 836 (1954).

3.

The lower court also properly adopted the doctrine of acquiescence or administrative estoppel in holding that the present attack on the Potthart patent, made some nineteen to twenty years after it was issued, comes too late. See *Brennan v. Udall*, 379 F. 2d 803 (C.A. 10 1967), cert. denied 389 U.S. 975 (1967). Petitioners' attempted distinction of this decision from the present case is completely ineffective when it is considered that Pottharst voluntarily signed a Mineral Waiver and accepted the patent and that the leasehold rights of

Getty and Gulf vested before the attack was made on that patent by Pottharst's predecessors.

It is submitted, therefore, that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN E. BAILEY
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Respondent

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New Orleans, Louisiana 70112

AUSTIN W. LEWIS
Attorney of Record
Attorneys for GETTY OIL COMPANY,
Respondent

E. CERTIFICATE OF SERVICE

I, Austin W. Lewis, attorney for Getty Oil Company, respondent, and a member of the Bar of this Court, here-

by certify that all parties required to be served with a copy of this brief have been duly served by mailing three copies of this brief to counsel of record representing them as follows, to-wit: Delta Development Company; Inc., through its attorney of record, A. Lane Plauche, 608 Pioneer Building, Lake Charles, Louisiana 70601; John E. Pottharst, Jr., Mildred Pottharst Ellis, Viola Pottharst Rowland (in various capacities) through their attorney of record, H. M. Holder, 1300 Beck Building, Shreveport, Louisiana 71101; The Louisiana Land and Exploration Company, through its attorney of record, J. B. Miller, Milling, Saal, Benson, Woodward & Hillyer, 1122 Whitney Building, New Orleans, Louisiana 70130; and by mailing three copies to Thomas Connell, in proper person, 538 Whitney Building, New Orleans, Louisiana 70130; in accordance with Supreme Court Rules, Rule 33, Paragraphs 1 and 2(a), all of the above having been mailed first class, postage prepaid, addressed, respectively, to counsel and/or proper person at the post office addresses above set forth, they residing within 500 miles of the undersigned, and by serving three copies thereof upon the United States by mailing same to the Solicitor General, Department of Justice, Washington, D. C. 20530, in an envelope so addressed, by air mail, postage prepaid, all of the foregoing having been deposited in the United States mail at New Orleans, Louisiana, on the ____ day of January, 1972.

AUSTIN W. LEWIS,
Attorney of Record

F. ADDENDUM

REGULATIONS
43 C.F.R. 116
(1954)

PART 116 — ABANDONED MILITARY RESERVATIONS[1]

CROSS REFERENCE: For public lands, military and naval reservations, Canal Zone regulations; see Panama Canal, 35 CFR Part 21.

§ 116.1 Installment payments for lands in abandoned military reservations optional with homesteader.

The act of August 23, 1894 (28 Stat. 491; 43 U.S.C. 1077, 1078), as amended by the act of February 15, 1895 (28 Stat. 664; 43 U.S.C. 1077, 1080), authorizing homestead entries in certain abandoned military reservations, provides:

---

[1]Regulations governing the sale and disposal of lands in abandoned military reservations have been issued from time to time. Most of the lands affected by such regulations have been disposed of.

On June 4, 1936, the Department issued instructions with reference to the disposal of the remaining lands in such reservations, affected by E. O. 6010, Nov. 26, 1934 and E. O. 6964, Feb. 5, 1935. The instructions state:

"Lands in abandoned military reservations were included in the withdrawals, and thereafter such lands were subject to use and disposition as provided in the several sections of the Taylor Grazing Act. Following the reasoning in the cited instructions of Jan. 2, 1914, the lands within abandoned military reservations may now be included and used in grazing districts, and may be disposed of as provided in secs. 7, 8, 14 and leased as provided in sec. 15 of the Taylor Grazing Act."

The above-mentioned instructions of Jan. 2, 1914 are reported in 43 L. D. 33.

(a) That persons who enter under the homestead law shall pay for such lands not less than the value determined by appraisement, nor less than the price of the land at the time of the entry, and such payment may, at the option of the purchaser, be made in five equal installments, at times and at rates of interest to be fixed by the Secretary of the Interior.

(b) The time for the payments in installments authorized by said act, and the interest thereon, will be as follows: Each homesteader will be given the option in making payment upon his entry of these lands, of making his payments in five equal payments to date from the time of the acceptance of his proof tendered on his entry, and the rate of interest upon deferred payments will be charged at the rate of 4 percent per annum.

(R. S. 2478; 43 U.S.C. 1201) [19 F.R. 8914, Dec. 23, 1954]

No. 71-821

In the Supreme Court of the United States

OCTOBER TERM, 1971

DELTA DEVELOPMENT COMPANY, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
KENT FRIZZELL,
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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-821

DELTA DEVELOPMENT COMPANY, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 102) is reported at 447 F. 2d 989. The opinion of the district court (Pet. App. 106–129) is reported at 322 F. Supp. 121.

JURISDICTION

The judgment of the court of appeals (Pet. App. 103–104) was entered on September 16, 1971, and a petition for rehearing was denied on October 8, 1971 (Pet. App. 105). The petition for a writ of certiorari was filed on December 22, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

456-468—72——1

QUESTION PRESENTED

Whether the United States validly reserved the minerals underlying certain public lands when it disposed of those lands.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Act of July 5, 1884 (23 Stat. 103, formerly 43 U.S.C. 1071 *et seq.*), the Act of July 17, 1914 (38 Stat. 509, 30 U.S.C. 121 *et seq.*), and the regulations under the 1914 Act (43 C.F.R. 102.23–102.28 (1940 ed.)) are set forth at Pet. App. 136–143 and 151–155.

STATEMENT

The government brought this quiet title suit to determine the ownership of the mineral rights in certain lands located in Plaquemines Parish, Louisiana. The district court ruled in a comprehensive opinion that the government owns the minerals by reason of a valid mineral reservation (Pet. App. 106–129). The court of appeals affirmed *per curiam* (Pet. App. 102).

The pertinent facts were stipulated by the parties as a basis for motions for summary judgment, and are set forth fully in the district court's opinion. Petitioners own the surface of the properties in question, which are salt water marsh lands situated within the Bastian Bay gas field (Pet. App. 106). This land originally comprised a federal military reservation, but was abandoned for that purpose in 1886 and placed under the control of the Secretary of the Interior for disposition pursuant to the Act of July 5, 1884 (Pet. App. 108). In 1946 John E. Pottharst,

petitioners' predecessor in title, applied for a patent to the land (Pet. App. 110). As required by applicable statutes, the government investigated whether the property was valuable for minerals; Pottharst filed a nonmineral affidavit stating that to his knowledge the land had no mineral value (*ibid.*). The government concluded otherwise following its investigation (see Pet. App. 111–113). Pottharst then consented to an amendment to his application, as required by statute, to exclude the minerals from it, and the patent issued to him reserved oil, gas, and certain other minerals to the government (Pet. App. 113–114).

Pottharst subsequently conveyed a portion of the property subject to the mineral reservation. The reservation was acknowledged again some ten years later, in 1958, in the probate proceedings concerning Mr. Pottharst's estate (Pet. App. 114–115). The government has issued a mineral lease covering the interest which it reserved; the lessees under that lease have expended substantial sums in developing the minerals in the property, and have paid substantial royalties to the government (Pet. App. 115–116).

On these facts, the district court held that the Secretary of the Interior was required by the express terms of the 1884 Act to determine the possible mineral character of the land involved here prior to any disposition (Pet. App. 122). The court concluded that the Secretary's decision that this land was valuable for oil, gas and certain other minerals was properly made and supported by the administrative record, and rejected the various arguments made by

petitioners challenging this (Pet. App. 116–121). As to the mineral reservation, the court held that the Secretary had properly reserved the minerals from the patent issued, in accordance with the 1914 Act (Pet. App. 117, 124), and ruled that the reservation, which the patentee accepted as a condition to his buying the land, could not be challenged at this late date (Pet. App. 129). Accordingly, the court ordered that title to the minerals be quieted in the government (Pet. App. 130–135). The court of appeals affirmed on the basis of "the cogent opinion of the district court" (Pet. App. 102).

ARGUMENT

For the reasons set forth at length in the district court's opinion, we believe that the decision below is correct. There is no conflict of decisions or other reason warranting further review by this Court.

1. Section 5 of the Act of July 5, 1884 (Pet. App. 140) provides that "Whenever any lands containing valuable mineral deposits shall be vacated by the reduction or abandonment of any military reservation under the provisions of this act, the same shall be disposed of exclusively under the mineral land laws of the United States." This explicit direction required the Secretary to determine whether the property involved here, which was an abandoned military reservation, contained valuable mineral deposits, and, if so, to apply the mineral land laws to its disposition.

That is precisely what was done here. Following the examination of this property, the Secretary concluded that it contained valuable mineral deposits.

It could then be disposed of only in accordance with "the mineral land laws of the United States."[1] When the disposition here occurred, the Act of July 17, 1914, required that lands classified as potentially valuable for minerals could be disposed of only if the minerals were reserved to the government. This requirement was fully applicable to the transaction involved here. See *Brennan* v. *Udall*, 379 F. 2d 803, 805 (C.A. 10), certiorari denied, 389 U.S. 975; *Anderson* v. *McKay*, 211 F. 2d 798, 803 (C.A. D.C.), certiorari denied, 348 U.S. 836; 43 C.F.R. 102.23 (1940 ed.), set forth at Pet. App. 151–152. Hence, the district court correctly concluded that the government's reservation of the mineral rights complied with applicable law, and that the government validly retained title to the minerals.

2. Additional considerations also support the decision below (see Pet. App. 125–129). The interpretation of the applicable statutes accords with the long-standing view of the agency (see, *e.g.*, *Simon*

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[1] The laws applicable, of course, were those extant at the time of the disposition of the land. *Northern Pacific R.R. Co.* v. *Sanders*, 166 U.S. 620, 634–637; *Northern Pacific Ry. Co.* v. *Soderberg*, 188 U.S. 526, 533–534; *Nelson* v. *Northern Pacific Ry. Co.*, 188 U.S. 108, 133–134; *West Coast Exploration Co.* v. *McKay*, 213 F. 2d 582, 597 (C.A. D.C.), certiorari denied, 347 U.S. 989; *Anderson* v. *McKay*, 211 F. 2d 798, 807 (C.A. D.C.), certiorari denied, 348 U.S. 836.

Randolph, 23 L.D. 516, 518). The consistent administrative position on the issue is entitled to weight.[2] See *Udall* v. *Tallman*, 380 U.S. 1, 16. Moreover, petitioners did not challenge the government's ownership of the minerals for many years, so their claims are barred by the doctrine of acquiescence. *Brennan* v. *Udall*, *supra*, 379 F. 2d at 807–808.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2] The government has disposed of the great bulk of the public lands covered by the 1884 Act in accordance with the view of the statutory scheme sustained by the courts below. A contrary decision necessarily would have a substantial unsettling effect on these transactions. Cf. *McLaren* v. *Fleischer*, 256 U.S. 477, 481.

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